No. 287.

Brief of King for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Oct. 1, 1897.

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No. 287.

A. M. THOMAS, J. B. HART and H. B. OWEN, as the BOARD OF COUNTY COMMISSIONERS OF KAY COUNTY, OKLAHOMA TERRITORY, *et al.*,

Appellants,

vs.

D. P. GAY and A. S REED, as partners as GAY & REED *et al.*

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF FOR APPELLANTS.

J. F. KING,
Counsel for Appellants.

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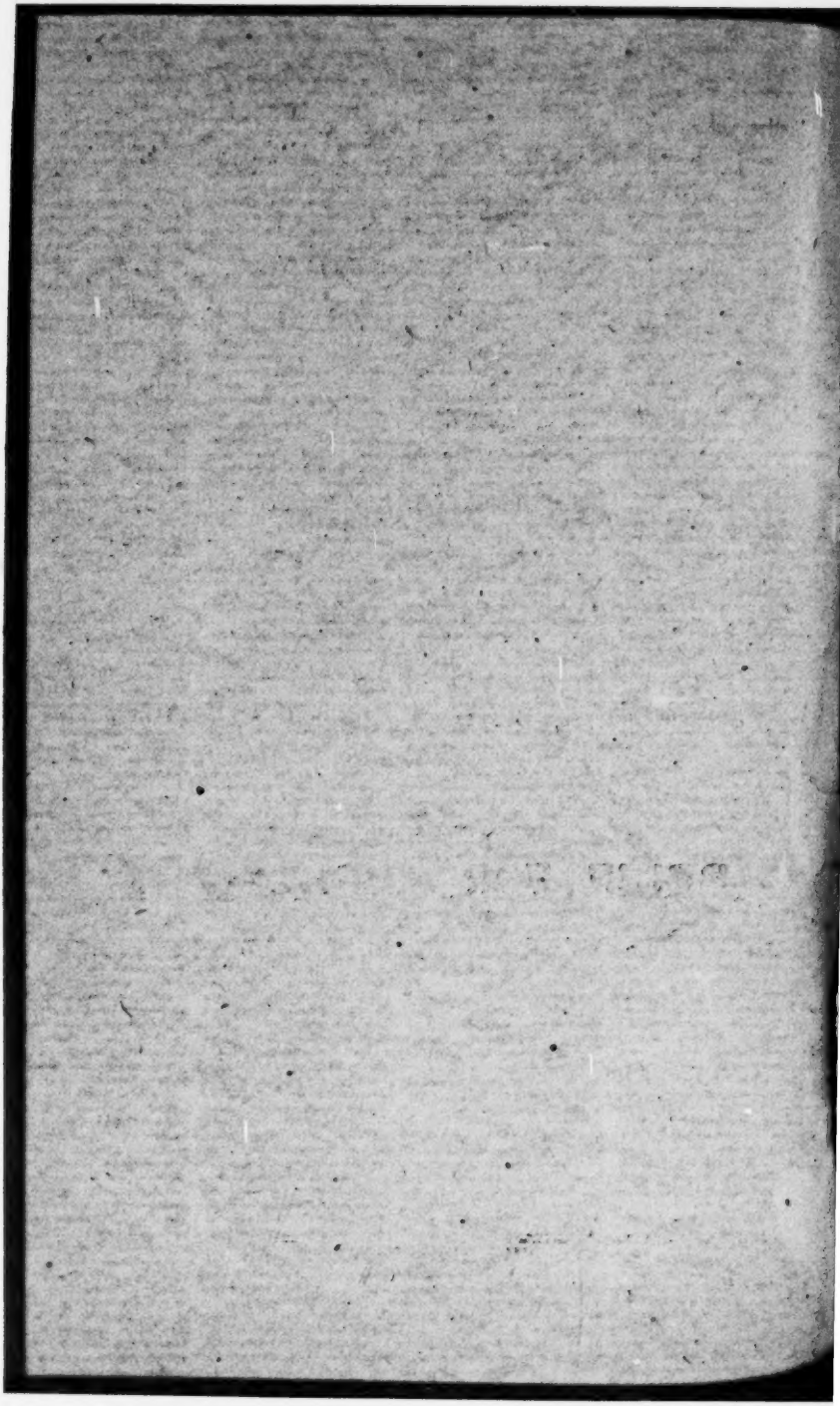

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 287.

A. M. THOMAS, J. B. HART and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. LANE, as the County Clerk of Kay County, Oklahoma Territory; S. J. SMOCK, as County Treasurer of Kay County, Oklahoma Territory; and H. C. MASTERS, as Sheriff of Kay County, Oklahoma Territory,

Appellants.

vs.

D. P. GAY and A. S. REED, partners as Gay & Reed; A. M. MILLER and J. B. JOHNSON as partners, as Miller & Johnson; M. HALFF and S. HALFF as partners, as Halff Brothers; R. H. HARRIS, W. C. HARRIS and WILLIAM CHILDERS as partners, as Harris Brothers & Childers; E. T. COMER and H. C. COMER, as partners, as Comer Brothers; J. H. CARNEY; G. M. CARPENTER; VIRGIL HERARD; G. T. HUME; W. F. SMITH and W. L. McCAULEY, as partners, as Smith & McCauley; W. F. SMITH; W. W. IRONS; A. I. ADAMS; A. I. ADAMS and NEAL SHAFER as partners, as Adams & Shafer; C. W. BURT; E. M. HEWINS; I. D. HARKLEROAD; DOUGLASS

PIERCE and J. T. CRUMP, as Partners as Pierce & Crump; JAMES STONE; W. M. HOLLOWAY; JESSE H. PUGH; R. H. MOSLEY; DRURY WARREN; T. J. MOORE; J. M. SLATER; and R. W. PROSSER.

Appeal from the Supreme Court of the Territory of Oklahoma.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

(The Statutes of Oklahoma involved in this case are printed at large in the appendix to this brief.)

This is an action in which the county officials of Kay county, Oklahoma Territory, were on the petition of appellees, permanently enjoined by the decree of the District Court of that county from collecting certain county taxes, levied upon the property of white citizens situated on the Indian reservations attached to that county for judicial and revenue purposes. The county appealed from this decree to the Territorial Supreme Court where the decree was in all particulars affirmed and now appeals to this Court.

The question in this case being, whether or not the Territorial Legislature exceeded its powers under the Organic Act in providing for the taxation, for county purposes, of the personal property of white citizens, situated upon the Indian Reservations attached for judicial and revenue purposes to that county. The petition

being a joint petition within the principle announced in *Washington Market Co. vs. Hoffman*, 101 U. S., 112; and the decree a single decree, enjoining about $20,000 in taxes, excluding penalties, interest and costs. The more than $30,000 involved in this case being as nothing, compared with the right of the various counties to tax the personal property of white citizens, upon all the Indian Reservations in Oklahoma—this being a test case. The facts are substantially as follows: The Organic Act of Oklahoma Territory, Act of May 2, 1890 (26 Stat. at L., 81), included all of the Kaw and Osage Indian Reservations, together with many other Indian Reservations, within the boundaries of that territory. There is nothing in the Organic Act, nor in any law of Congress, nor in any treaty with the Indians, which directly or by inference excepts these reservations out of the territory for any purpose. The Organic Act, Section 9, provides:

"And the territory not embraced in organized counties, shall be attached for judicial purposes, to such organized county or counties as the Supreme Court may determine."

In pursuance of that Act, the Territorial Supreme Court, on the third Monday of February, 1894, attached the Kaw and a portion of the Osage Indian Reservations to Kay County for judicial purposes; and the balance of said reservations, and all other Indian reservations, to the various other organized Counties in that Territory. (Record, page 9). The Territorial Legislature, by an Act passed March 5th, 1895, Article 6, Chapter 43, Laws of 1895, adopted these divisions as taxing districts, and provided for the assessment and taxation of all per-

sonal property thereon, other than the property of the Indians; and that the same should be taxable in the organized county to which the district was attached for judicial purposes. (Appendix, page 42).

In obedience to this legislation, the Board of County Commissioners of Kay County, for the year 1895, caused an assessment to be made of the property situated in the Indian country so attached to it, and in and for the same year duly levied the following taxes upon it and all taxable property in Kay County. (Record, page 13).

TERRITORIAL TAXES.

General revenue, three mills on the dollar; University fund, one-half mill on the dollar; Normal school fund, one-half mill on the dollar; bond interest fund, one-half mill on the dollar; Board of Education fund, one-tenth mill on the dollar.

COUNTY TAXES.

For salaries, five mills on the dollar; for contingent expenses, three mills on the dollar; for sinking fund, one and one-half mills on the dollar; for court expenses, two and one-half mills on the dollar; for county supplies, three mills on the dollar; for road and bridge fund, two mills on the dollar; for poor fund of said county, one mill on the dollar; for county school purposes, three mills on the dollar.

The taxes becoming due, the county officials were proceeding to collect them, when, on January 8th, 1896, the appellees began this suit by filing their joint petition in the District Court of Kay County, Oklahoma, alleging that Kay County was a part of the Cherokee outlet opened to settlement September 16th, 1893; that

immediately upon said opening a county government was established therein; that no part of said taxed district is within the Territorial bounds of Kay County; and that the Kaw and Osage Reservations are not, and never have been, a part of Oklahoma Territory for taxing purposes; "that the Supreme Court of the Territory of Oklahoma, on the third Monday in February, 1894, by order, duly entered on the Journal of said Court, attached to said County of Kay aforesaid all of the following Indian reservations and territory, to-wit: All of the Kaw, or Kansas Indian Reservation, and all of the Osage Indian Reservation north of the township line dividing townships 25 and 26," for judicial purposes, and judicial purposes only.

That the Territorial Legislature passed the Act above mentioned, providing for the assessments and taxation of personal property situated in any unorganized county, district or reservation in the county to which it was for judicial purposes attached.

That an assessment of all the personal property in the said territory, so attached to Kay County for judicial purposes, was made and returned to the County Clerk of Kay County, in the time provided by said Act.

That none of the plaintiffs at any time owned any property in Kay County proper. That the district so attached is comprised of Indian Reservations, and consist principally of wild, unimproved, and unallotted lands, which said wild, unimproved and unallotted lands, which were not needed for allotment, were leased to plaintiffs under the tribal governments under the control of the Commissioner of Indian Affairs, and the Sec-

retary of the Interior, for grazing purposes. That plaintiffs at the commencement of the grazing season for 1895, drove, transported and shipped, to the ranges and pastures in said Indian Reservations, large herds and quantities of cattle, which were taken on said Reservations in pursuance of, and by virtue and authority of, said leases, together with other articles of personal property necessary in the care of said cattle.

That the plaintiffs are all non-residents of the Territory of Oklahoma. That the greater portion of said property was for the year 1895, assessed and taxed in the States from which they were removed to said attached district. That none of said property of these plaintiffs was in Kay County, nor was the greater portion thereof within the said territory attached to said Kay County for judicial purposes, at the time when other property in Kay County was valued for taxation, to-wit, the first day of February, A. D. 1895, but that a greater part of the property of said plaintiffs attempted to be valued and assessed by the authorities of said County of Kay and Territory of Oklahoma, was located and removed into said territory attached to said Kay county for judicial purposes, after the first day of April, A. D. 1895, and before the first day of May, A. D. 1895. That the said cattle, by reason of natural growth and increase in the market value, and the improvement in their condition, had greatly and substantially improved and increased in value between the first day of February, A. D. 1895, and the first day of May, A. D. 1895.

That the same class and kind of property located in said Kay County, and also located and kept throughout

the Territory of Oklahoma, during the same period improved and increased in value likewise, and to the same extent; and the same class of property located in said territory did, during such period, greatly and substantstantially increase in value between such dates, and during the same time.

That the property of plaintiffs was assessed at $760,469.00. That the Territorial Board of Equalization raised the assessment of Kay County 35 per cent., which was carried out against the property of plaintiffs, raising said assessed valuation to $1,026,634.00. That the valuation and assessment was made on the first day of May, 1895. That the taxes on said assessment amounted to $26,174.16.

That the action of the Territorial Board of Equalization in attempting to raise the valuation of the property of the plaintiffs, and the action of the County Clerk in attempting to extend the same, and such raised valuation on the taxes for said county against said plaintiffs was null and void.

That the said assessment and levy of taxes was null and void, for the reasons that the act under which the assessment was made is local and special legislation. That said act makes an unequal discrimination in taxation, and for the reason that the residents of the attached territory have no voice in creating the indebtedness for the payment of which these taxes are levied, no voice in the election of the county officials, and derive no benefit from said taxes. And pray an injunction against the collection of said taxes. (Record page 7). To this petition defendants filed a general demurrer, (Record page

17), and upon the trial of the issues thus raised the Court sustained the demurrer, and dissolved the temporary injunction as to all the territorial levies and the county levy for court expenses, and overruled the demurrer and granted a perpetual injunction against the defendants levying or attempting to levy or collect, the balance of said county levies.

From this decree both parties appealed to the Territorial Supreme Court, where the decree was in all particulars affirmed; and the appellants (defendants in the trial court) now appeal to this court.

This case stands on petition and demurrer. Appellants contend, however, that the ninth subdivision of appellee's petition contains no statement of fact; that it is the legal conclusions of the pleader, from the previous statements of fact, and therefore not admitted by the demurrer. (Record, page 14). That it is but the reasons and conclusions of the pleader, and so expressly stated to be by him, at the outset in the framing of said subdivision or paragraph.

If we understand the law, a general demurrer admits only such facts as are well pleaded; and it particularly does not admit the conclusions of law of the pleader from his previous statement of facts in the petition or pleading attacked.

Appellants further contend, that the general charge in the ninth subdivision of appellee's petition, that they derive no benefit from these various county levies, is as consistent with the theory that the county officials have the legal right to levy and collect these taxes, but that, disregarding their official duties, they do not expend

them for the benefit of these people; as it is with the theory that the legislature has exceeded its authority in providing for the levy of the taxes.

While the law presumes that county officials do their duty, yet this presumption, we think, would give way to the stronger presumption, that the legislature, a co-ordinate and co-equal branch of the government, had not abused its authority and passed an unconstitutional law.

That these statements in the ninth subdivision of plaintiff's petition are not admitted by the demurrer, we understand to be the holding of both the trial and the territorial Supreme Court. For in each instance the territorial taxes were upheld, notwithstanding the allegation in the ninth subdivision of plaintiff's petition: "That the Osage Indian Reservation, and the said Kaw Indian Reservation, are not properly a part of the Territory of Oklahoma for the purpose of taxation for territorial purposes, nor do the residents of said Indian reservations participate in the benefits of the territorial government, but that the said taxation throughout is taxation for a private, and not for a public use, and is an illegal and unequal exaction, not in behalf of and for the use and benefit of the Territory of Oklahoma and the Courts therein, but is exacted for the private use and benefit of the residents of said Territory;" and the case must have been decided by both Courts, only upon the facts set forth in plaintiff's petition previous to the ninth subdivision thereof. And we fail to understand, and we believe the Court will fail to find, that the Act in question is unconstitutional, and the taxes illegal upon the showing so made.

While we believe we are correct in this contention, we will ask the indulgence of the Court, further along, to invoke its judicial notice of what are and are not benefits to the taxpayer, if benefits are necessary to sustain taxes, and to the further contention of appellants, that not benefits but equality of sacrifice is the rule in the apportionment and levy of taxes.

ASSIGNMENT OF ERRORS.

1. The District Court below erred in giving judgment and decree in favor of plaintiffs, (appellants herein) decreeing them and granting a perpetual injunction, forever and perpetually enjoining and restraining defendants (appellants herein), from levying or collecting or attempting to levy or collect, either or any of the fol lowing named taxes for the year 1895, to-wit: For salaries, for contingent fund, for sinking fund, for county supplies, for road and bridge fund, for county poor fund, and for county school fund; and the Supreme Court of Oklahoma Territory erred in affirming the same, because the facts do not justify such decree, and the said decree is contrary to law.

2. The District Court below erred in its finding and conclusion of law, that the property of plaintiffs below, (appellees herein) "located in the Kaw Indian Reservation and in that part of the Osage Indian Reservation attached to the County of Kay for judicial purposes, is not subject to taxation in the said County of Kay for either, or any of the following County purposes, to-wit: For salaries, for contengent fund, for sinking fund, for county supplies, for road and bridge fund, for county poor fund, and for county school fund; for which total

levies are shown by said petition to have been made against the property of said plaintiffs, located in said Indian Reservations as aforesaid, of eighteen and one-half mills, which levies so attempted to be made against the property of the said plaintiffs, for the year 1895, is hereby adjudged to be null and void." Said finding being against the facts set forth in plaintiffs' petition, and against the law, and the Supreme Court of Oklahoma Territory erred in affirming the same.

3. The District Court below erred in overruling defendants' demurrer to plaintiffs' petition as to the following County levy of taxes, to-wit: For salaries, five mills; for contingent fund, three mills; for sinking fund, one and one-half mill; for county supplies, three mills; for road and bridge fund, two mills; for poor fund, one mill; for county school fund, three mills; and so erred as to each of said levies, and in rendering judgment against defendants, perpetually enjoining them, and each of them, from levying or attempting to levy or collect said taxes or any of them, and the said Supreme Court erred in affirming the same.

4. That the Supreme Court of the Territory of Oklahoma, and the District Court below, erred in finding and holding that Article 6, Chapter 43, Laws of Oklahoma Territory, 1895, approved March 5, 1895, was unconstitutional, void and beyond the powers of the Legislature of Oklahoma, in so far as it authorized or attempted to authorize a levy for County taxes for the following purposes: For salaries, for contingent fund, for sinking fund, for county supplies, for road and bridge fund, for poor fund, and for county school fund.

5. The said Supreme Court, and the District Court below, erred in holding said Article 6 unconstitutional and void in so far as it authorized, or attemped to authorize, Kay County, Oklahoma, and its Board of County Commissioners, and its duly authorized officials, to levy and and collect county taxes for salaries, for contingent fund, for sinking fund, for county supplies, for road and bridge fund, for poor fund, and for county school fund, upon property situated in the Kaw and that portion of the Osage Indian Reservations attached to said Kay County for judicial purposes.

6. The Supreme Court of Oklahoma Territory erred in not granting the relief prayed in the cross-petition in error, and in not reversing the judgment and decree of the District Court below, dissolving the said injunction in toto and decreeing each and all of said tax levies legal, and a right in the cross-petitioners to proceed and collect the same, and in not dismissing the suit of plaintiffs at their costs.

This assignment of error is stated somewhat differently from the way in which it was stated in the appeal papers, though, we think, in substance, the same. This, we understand, we may do under the rules of the Court.

ARGUMENT.

In the language of the Court below (Record, page 32), the only question in this case is, "Did the Legislature, by the Act of 1895, under authority of which the taxes in controversy were assessed and levied, transcend its powers? And is such act a violation of any constitutional or other fixed general rule controlling the dis-

cretion of the Legislature?" And answered it by holding that the Legislature did so transcend its authority.

Appellants contend that the people upon these reservations do receive benefit, and adequate benefit, from the collection and expenditure of the taxes in question, and in addition contend for the following propositions. Though they are much broader and stronger than it is necessary to sustain in order to uphold these taxes, yet we believe they state the law:

I.

In the absence of treaty stipulation, personal property, other than Indian property, situated upon the Indian reservations within the boundaries of the States and Territories of the Union, is taxable for State, Territorial and all county purposes to the same extent, and for the same purposes, as personal property situated upon lands, the legal and equitable title to which is in white citizens of the particular State or Territory.

II.

Where unorganized territory is attached to an organized county for judicial and revenue purposes, the unorganized territory is within the legal boundaries of the organized county. "Pro hac vice the boundaries of the latter are enlarged so as to include the former, it is tantamount to this, one part of

the statute gives the territorial boundaries, the other provides what shall be for certain purposes the legal boundaries."

III.

In the absence of constitutional prohibition, it is the right of the State or Territorial Legislature to provide for the taxation of all property situated within the legal boundaries of its organized counties for all county purposes, even though certain individuals in, or certain parts of particular counties, do not receive their share of the benefits resulting from the expenditure of the taxes so collected.

IV.

It is for the legislative, and not the judicial department, to determine when an unorganized district, or county, has sufficient population, wealth, or other qualifications necessary to sustain organized county government; and until the unorganized country, or district, has attained to the necessary conditions, it may, during its infancy, be placed by the legislative department within the jurisdiction and care of an organized county for judicial and revenue purposes.

The Organic Act of the Territory of Oklahoma provides "That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United

States." This is the same measure of legislative power granted in the Organic Acts of Kansas and Iowa, and so far as we have examined, in the Organic Acts of the other Territories organized subsequent to Iowa.

We believe that it means the same thing to Oklahoma that it did to Iowa, and that therefore many of the refinements introduced into some of the late State Constitutions can have no application to Oklahoma. They are at least not found in the Constitution or laws of the United States, and therefore not binding on the Oklahoma Legislature.

Considering the fact that Congress adopted this as the measure of legislative power at an early date, before the refinements in modern legislation had become pronounced; that these Organic Acts were passed for a pioneer population, without complex or large business interests, necessitating many of the checks and refinements of populous, long settled, and wealthy States that have had long time and experience to nicely adjust, and carefully adopt, in the light of experience a refined and nicely discriminating system of laws; considering that at the time of the passage of the Organic Act of a Territory, the people are an inexperienced, pioneer population; that they will have to speedily adopt, and as speedily put into operation, an entirely new code of laws; and that from the want of time and experience these laws, as applied to their condition, must be crude; considering all these things, as no doubt Congress did in adopting this language, it is not to be supposed that Congress contemplated on their part a very refined or nicely adjusted system of laws, with nicely balanced

checks and restraints. A larger measure of legislative power cannot well be imagined; and we would interpret it to mean, that in creating the legislative department and conferring upon it this measure of legislative power, Congress must be understood to have conferred the full and complete power as it rests in, and may be exercised by, a sovereign power generally, subject only to such restraints as it may see fit to impose, and to the Constitution and laws of the United States. This measure of legislative power is incompatible with the idea that the Territorial Legislature is a special agency for the exercise of specifically defined legislative powers. But rather is intrusted with general authority to make laws at discretion for the Territory generally, subject to the limitations noted.

As the only objection found to these taxes by any of the trial courts or the Territorial Supreme Court was, that the Territorial Legislature transcended its powers in providing for the levy of these taxes, because of the want of benefit to these appellees from their collection and expenditure, we will ask the indulgence of the Court to present that point first. This Court takes judicial notice of what are "public purposes" in the law of taxation, and for what taxes, when collected, may be expended. Which, if we understand it, is but saying this Court takes judicial notice of the law.

None of these taxes were for any permanent improvements, nothing but current expenses for the fiscal year.

Appellees were not taxed for any permanent improvements the use of which they could claim, or do claim,

would go to Kay County should they in future be separated from it.

Section 1788 of the Statutes of Oklahoma, 1893, provides: "They (the County Commissioners) shall submit to the people of a county at any regular or special election involving any extra outlay of money by the county, or any expenditures greater in amount than can be provided for by the annual tax, or whether the county will construct any court house, jail, or other public buildings, or aid or construct any road or bridge, and may aid in any enterprise designed for the county, whenever a majority of the people thereof shall authorize the same as hereinafter provided."

Kay County has not a permanent county building. It has not even a permanent county seat. There is no claim in appellees' petition that they were taxed for any permanent improvements, or any improvement that will remain and be valuable to the county after separation shall take place, should there be a separation from this attached country in the future.

These specific levies are provided for by Chapter 43, Article 2, Section 3, of the Laws of 1895, providing, among other things, as follows: "The levies for county purposes shall be a separate, specific and certain levy for the payment of salaries; a levy for court expenses not exceeding three mills; for the support of the poor, including insane, not exceeding two mills; for roads and bridges, not exceeding two mills; for county supplies, not exceeding three mills; for contingent fund, not exceeding three mills. The last item shall include all county expenses not properly chargeable against any

of the other funds hereinbefore provided for; and for a sinking fund to be paid in money, such rate as in the estimation of the Board of County Commissioners will pay one year's interest on all outstanding bonded debt of the county, together with such part of the principal as shall be by law required. Said fund to be applied, first, to the payment of the interest; and, second, to the payment of the principal."

"Such estimates shall contain the foregoing items, together with estimated amount of necessary revenue to be raised for each fund, and the rate of levy necessary to raise such revenue for each fund separate. * * And no levy of taxes shall be made for any other purpose or any greater amount than is specified in such estimate."

As there is no claim made by the appellees that any of these taxes were levied for the making or erection of any permanent improvements in Kay County, or that any election was held for such, as provided in the statute quoted, it is unnecessary to consider this branch of the subject further. The inhabitants of this attached territory have as much interest in, and derive at least as much benefit from these taxes, as do the inhabitants of Kay County.

This Court, in the case of *The United States vs. Pridgeon*, 153 U. S., 48, decided that these Indian Reservations were within the boundaries of Oklahoma Territory; that the laws of Oklahoma Territory were in force in them, superseding the United States Statutes previously in force. It is also said in that opinion: "The Courts created for the Territory of Oklahoma are clearly dual in their nature. They sit as territorial Courts to

administer the laws of the Territory and as Courts of the United States to administer the laws of the United States;" and this was held to apply to territorial offences committed on the Indian Reservations in that Territory.

We believe this Court has a right to determine in this case what these various County levies involved in this case mean, and for what purposes these various County funds can be expended, and we further believe, that the Court will define them to mean that they can be used only for the purposes which the Oklahoma Legislature says they can by an Act passed March 12, 1897. (Art. 8, Chap. 32, Laws 1897).

"Section 1. The salary fund shall be used only for the compensation of the County Treasurer, County Attorney, County Clerk, Sheriff, Coroner, County Superintendent, Assessors and County Commissioners.

"Sec. 2. The Court funds shall be used only for the payment of witnesses, jurors, stenographers, bailiffs, janitors for the District Court, and the fees of Justices of the Peace, Probate Judge, Constables, and Clerks of the District Court, and in addition in Counties which have heretofore or which may hereafter construct court houses or jails, to be paid for by an annual rental, such rental shall be a proper charge against the Court fund, and an additional levy, not exceeding three mills, may be made for that purpose.

"Sec. 3. The road and bridge fund shall be used only for the construction and maintenance of county bridges, and the opening and changing of roads, exclusive of grading, and the purchase or condemnation of the right of way for roads.

"Sec. 4. The poor and insane fund shall be used only for the maintenance of the poor and insane and their transportation, of necessary guards and attendants.

"Sec. 5. The supply fund shall be used, only, for the purchase of books, blanks, stationery, furniture, fuel,

lights, and other necessary supplies, and for rents, repairs and insurance.

"Sec. 6. All allowances properly chargeable against the county, not herein made chargeable to some other fund, shall be paid out of the contingent fund."

True, this Act was passed after the levy complained of. It may assist a county official but it cannot assist a Court in determining from what fund a bill should be paid, and we think the Court will agree with us, that the Act meant the same thing practically, if not exactly, in 1895 that it did after this explanatory statute.

It is the duty of the County Attorney to prosecute offenses against the territorial laws, and take care of the county and territorial interests in this attached territory, the same as though these lands belonged to white citizens and were within the geographical boundaries of Kay County. The Probate Judge has, by laws put in force by the Organic Act, and continued by the Territorial Legislature, a large criminal and civil jurisdiction over these reservations. He is his own clerk, he tries their cases, subpœnaes their witnesses, does all the clerical work of his Court and office, or pays for it out of his own pocket; issues their marriage licenses, probates their wills, administers their estates, &c. He does for the people of these reservations everything that is done for the people of Kay County. The Sheriff is required by law to serve their summons, executions, and Court processes of all kinds, arrest offenders, preserve the peace and performs for them practically the same duties as he performs for the people of Kay County. The Sheriff draws his fees in criminal cases from the county. Where

he does not draw them from the county, of course neither the people upon these reservations nor the people of Kay county proper, are taxed to pay them.

The County Clerk must receive, file and look after their claims against the county; for instance, their witness fees, their claims for damages upon the County, roads and bridges, etc., etc. By the decision of the territorial Supreme Court in this case, he must keep an individual account with every person who owns a dollar's worth of property in these Reservations, by providing for and receiving the assessments on which is based the territorial and Court expense levies, and must spread their account upon the tax-roll, and it is but very little more labor to add the amount of the other funds, once the account is opened.

The Board of County Commissioners must provide for the assessment of their property, pass upon their bills against the County, and look after the County matters incident to that country in general. By the decision of the Trial and Supreme Court in this case, the County Treasurer must also keep an account with every taxpayer in this attached territory, collect and safely keep and pay out the territorial and Court expense funds held good. The Coroner must hold his inquests, and when the Sheriff is disqualified, act in his stead, and Assessors must be paid to assess their property. (The cost of assessing this country, attached to Kay County, for 1895, being over eleven hundred dollars). This Court takes judicial notice, because it is the law, that these officers must all do these things.

Then is it morally or legally right that these people

should be excused from contributing a cent towards the salaries of these officers? This levy for salaries is payable only for salaries of the county officials. Having township government each township pays the salaries and fees of the township officers. Every one of these officers performs practically the same services for the people on these reservations that they do for the people of Kay County proper.

COUNTY SUPPLIES.

"Section 5. The supply fund shall be used only for the purchase of books, blanks, stationery, furniture, fuel, lights, and other necessary supplies, and for rents, repairs, and insurance."

The judgments, marriage licenses, mortgages, and wills of the people on these reservations are entered upon the blank books, blanks, and records of, and by pens and ink and stamps paid for by Kay County. They use the furniture of all the county offices. The court house is insured and repaired for their benefit as much as anybody else. Their attorneys and themselves come to the court house, sit down in chairs and at desks paid for by county money and on the 8th day of January, warmed by fires paid for by the county out of the supply fund, present a petition to the court praying an injunction against the collection of taxes for the supply fund on the ground that they derive no benefit from it. And the court picks up a pen paid for out of this fund, and with ink paid for out of this fund, records in a docket paid for out of this fund, that the claim is true and that the writ should go. If there is anything purchased or that can be lawfully purchased out of the supply fund that these people on these reservations do not

use and enjoy to the same extent as the residents of Kay County proper, we would be very thankful to the counsel for the appellees to point it out to the Court.

ROAD AND BRIDGE FUND.

Judge Cooley in his work on Taxation, 2nd Ed., p. 82, says:

"Roads and Bridges—In a certain sense they are of local concern because the local organizations construct and support them, but they are constructed for the general benefit and use of all the people, and are only turned over to the localities as a matter of apportionment."

They are in fact and in law the "king's highways," the roads of the State or Territory. It would appear that all the people of a State or Territory ought to contribute to what is really a State or Territorial work. But the people of these reservations receive as much, and as a rule, more benefit from these roads and bridges than the people of the county to which they were attached. This Court takes judicial notice that these people must come to the county seat to try their lawsuits, pay their taxes, and transact their business with the county and Territory in general. That under the law there cannot be, and in fact, there is not any cities or towns in these reservations. Therefore, these people do come, and have to come, to the towns in these organized counties to buy their supplies and to do their business generally, they must travel, and do travel, at least from the geographical boundary of the county to where the town may be. Newkirk, the county seat of Kay County, is the nearest county seat to any of these reservations. Yet the nearest road from this attached country to this town is six miles, and from that to twenty miles—on an average, about ten

miles. Considering that we have about five towns in Kay County, it is found that the people in this attached territory travel over a greater extent of the roads of Kay County than the people on an average in Kay county do. And in Pawnee County, and others where the county seat is much farther from the county line, they must certainly use them much more than the people of those particular counties. Then some of the people in the eastern end of this attached territory trade in Kansas towns but the roads in Kay County are very much used by the people from Kansas, and why should not these people help make roads for the Kansas people in return for the use of their roads? Is not this the system which the Statutes and Laws of the United States and of the states generally have sought to accomplish—comity between the States and Territories?

Can a farmer living one mile from town legally refuse to pay more than one-fifth of the road tax of the farmer who lives five miles from town?

The tax in question is but a small part of the road tax paid by the people of Kay County. Every man in Kay County is required to pay a poll tax, which is all expended upon the roads. Then the county is divided into road districts, and each road district grades and takes care of its own road beds, to none of which these appellees are required or asked to contribute. And as the law before Kay County was opened to settlement (and it has remained the law ever since) made every section line a public road, (giving a road free on two sides of every farm) it is apparent that very little land is pur-

chased for roads, and no permanent bridge can be built without a vote of the people.

POOR FUND.

As shown by the quotation from the statute, part of this fund is also expended in taking care of the insane. In the sense that benefit is used by the appellees, what taxpayer in Kay County derives any benefit from money raised by taxes for the care of the poor? Insanity in Oklahoma is determined by a judicial proceeding in the Probate Court (Chapter 42, Laws 1893), as is done in the States generally.

The attachment for judicial purposes carries with it the duty of the courts to pass upon the question of insanity, and as a consequence the county must pay the expense. Congress certainly did not intend that the courts should convict criminals and find people insane, and then turn them loose for the want of means of confining them. We think it is clear, from the acts of Congress and the Territorial Legislature, that it was intended that Kay County should take care of the poor and insane of this attached district. But suppose this were not true. Your Honors would take judicial notice of the fact that a starving man would seek relief at the nearest point where relief could be had, and that naturally these poor people would settle in the contiguous territory of Kay County, and become a charge upon that county. If there was no public provision for the poor in Brooklyn would not New York City become the early abiding place of the public charges of Brooklyn? Is it not the duty of all the people of a State or Territory to con-

tribute to the support of the poor and insane of that State or Territory? The casting of the burden by the Legislature upon the counties is a mere matter of apportionment. It does not make the duty any more sacred. It would not add to the moral obligation had the Territory levied the tax under the head of Poor Fund, and taken care of all the poor and insane in the Territory. It would appear from the decision of the Territorial Supreme Court that if the Territory itself had levied a tax to take care of all the poor and insane in the Territory, it would be legal. But when it is apportioned to the counties as the statutes do, it is held unconstitutional. We would think that justice would impel them to pay it to that county where they continually bring their poor and insane to be taken care of out of the county treasury.

These unfortunate people under the law, and in fact, are just as well taken care of by the officials of Kay County as though they were within its geographical boundaries.

FOR SCHOOL PURPOSES.

The people on these Reservations have certainly an interest in the rising generation, that an intelligent race of voters may exist, and that this government may live. That from the Township Constable to the President of the United States, their persons and property, and that of their children, may be protected in all their rights; and they certainly owe something to the Territory, the future State, that she may take her place worthily by her sister States. By helping to educate Kay County they aid directly the United States. This is not the

school district tax. Under the laws of Oklahoma, as is the law in the States, generally, each school district must build its own school house, keep it in repair, and furnish the same with necessary fuel and appendages, and maintain such school as they are able within a two per cent. levy. (Okla. Laws, 1895, Chap. 45, Art. 7).

But experience has taught the various State and Territorial Legislatures that some school districts are rich, and some are poor and unable to maintain a school for many months in the year; so, in addition to the school tax which such school district levies, a tax for school purposes is levied on all the property in the County, and the County School Superintendent is required to apportion these school taxes among all the school districts in the County, in proportion to the number of school children in each school district; (St. of Oklahoma, 1893, Sec. 5752,) and similar laws are in force in most if not all the States.

The very foundation of this school tax, its basic idea, is the taking from those who have, and the giving to those who have not. If the objection of appellees is good, that before a tax can be collected the County must be legally bound to spend it upon the particular people who paid it, then the people in the rich school district in which is situated the County Seat, can most justly complain in the Courts of being compelled to contribute to the poor school district in a remote part of the County, that they contribute vastly more in proportion to the latter district than it contributes to them. Is it not a violation to the extent of the surplus contribution of the principle contended for by appellees?

The duty of all the people of the United States to contribute a fair share of their individual property to the support and upbuilding of the public school system; that this, the best government on earth, might live, that it may in the future, as in the past, continue to protect them in their lives and their property, is surely ample compensation for the tax. This is the compensation that people in Massachusetts and New York get for consenting that the public domain in Kansas and Missouri may be given to these States for the upbuilding of their State Universities. But these people receive ample direct benefits from this school tax.

Writers upon political economy and upon taxation tell us, that non-residents and residents who do not send, or have not the children to send to school, do receive ample benefit from school taxes, and assign three reasons. By schools a just and efficient government is built up, by which they are protected in their lives and their property, the labor for which they pay is better performed, and a market is created for whatever they produce. (Wayland's Pol. Econ. pt. 4, chap. 3, sec. 1. Cooley on Taxation, 120.) And these people are receiving all these benefits, if not all from Kay County and Oklahoma, yet from people who in turn are helped and assisted in these respects by Kay County and Oklahoma.

No doubt several of these appellees, if not all, have children going to the public schools in counties in Texas, in Kansas, etc., without contributing a share of this their property to their support. And no doubt there are people living in Kay County who own property in the counties where some of these appellees live, and help educate

their children. And no doubt there are people living in Kay County, who own property in, and help educate the children in counties in Kansas, Texas, etc., whose parents own property in and help educate the children of appellees in the counties where they live. These things may go around in a circle, but they accomplish in the end even-handed justice, as the fathers designed that County and State government should do. Does Massachusetts and New York receive no benefit from the thousands of good and brilliant men and women they have educated and sent west? Did it pay? Do they regret it? Could a public school system have been built up in this country on the lines indicated by appellees? But these people are by the Organic Act put under the governmental care and protection of Kay County. The only guarantee of their personal or property rights is in the educated intelligence and efficiency of Kay County, and the measure of this intelligence and efficiency is the measure of its public schools. And many of the people on these reservations educate their children in Kay County schools. It is a benefit to have schools and churches and civilization brought to their doors.

But suppose that none of these propositions applied to these reservations; it is morally certain that whatever money Kay County will get from this school fund, will be more than spent by Kay County in criminal costs, sheriff's fees, county expenses, loss of property, and losses generally incident to governing and taking care of a class of country that is notoriously, and historically the seat of crime and the abiding place of professional criminals.

As will appear in *U. S. vs. Kagama*, 118 U. S., 375, Kay County must pay the expense of the criminal prosecution of Indians for offenses against the Territorial laws—in the most serious offenses and the most costly to prosecute, and it cannot tax them.

We believe this Court will agree with us that it is cheaper to educate, than to take care of the criminals, and paupers, and insane, and suffer the losses that are always the consequences of ignorance, of children growing up in ignorance, and particularly in the surroundings on an Indian Reservation. The magazines of this country contain articles by able men, in public, and private life, showing by clear proof that the cost of taking care of criminals, and property loss as the consequence of permitting children in New York and other large cities to grow up in ignorance, and without attendance in the schools, is greater than the cost of providing schools. And a child in the streets of New York has a very much better chance to make a good citizen than a child on an Indian Reservation.

THE CONTINGENT FUND.

Out of this must come the attorney's fees and expenses of more than fifty suits arising out of these taxes. Will it be no benefit to these appellees to pay for the trouble they have made and learn the duties of the citizen to the State? And when these fees and expenses are paid there won't be any contingent fund.

But these appellees allege that they are all non-residents of the Territory of Oklahoma. It would appear that he who comes into a court of equity should show that he himself is injured by the action of the party against

whom he complains. If this is true and their claim as to what constitutes benefits is true, then what just ground of complaint have these parties that the levy for school purposes is not spent in the neighborhood of their cattle; that the poor and insane fund is not expended in the neighborhood of their ranches? If the people in these Indian reservations are satisfied, what ground have these non resident to set up defenses for them. An injunction against the collection of taxes should only be granted when the plaintiff brings himself clearly within some of the grounds for equitable relief, and that showing is entirely wanting in this case, we believe. As shown by the decisions above cited, the property on the Maricopa Reservation in Arizona, upon the Shoshone Reservation in Wyoming, upon the reservation in Montana are taxable for all county purposes. What greater benefit can the people upon these reservations derive from the salary fund than the people on the Oklahoma Reservations.? Their county officers have no more authority on these reservations than the county officers of Oklahoma have on the reservations in Oklahoma. No treaties in the way in any of them. The laws of congress over all. What more benefit can the people of the reservations in these last mentioned states and territories derive from the county supplies than the people on the Oklahoma reservations? What greater right have the county officials of Arizona, Wyoming, or Montana, to go upon the reservations under their jurisdiction, and dig up the soil and build roads and bridges than the county officials of Kay County, Oklahoma ? Would it not be just as true for the people upon the reservation in Montana to say that they derive no benefit from the expenditures of the county moneys

as the appellees to say that they derive no benefit from the taxes in question? What greater right have the county officials to build school houses on, and maintain schools in the Indian reservations of Montana, Arizona, and Wyoming than have the officials of Kay County to do the same on the Osage Reservation?

I.

In the absence of treaty stipulation, personal property, other than Indian property situated upon the Indian reservations within the boundaries of the States and Territories of the Union, is taxable for State, Territorial, and all county purposes to the same extent, and for the same purposes as personal property situated upon lands the legal and equitable title to which is in white citizens of the particular State or Territory.

We believe that the foregoing proposition is amply sustained by the following authorities:

Utah & Northern Railway Co. vs. Fisher, 116 U. S., 28.

Maricopa & Phœnix R. R. Co. vs. Territory of Arizona, 156 U. S., 347.

Truscott Co. Treasurer vs. Hurlbut Land and Cattle Co., 19 Circuit Court of Appeals, 374.

Torrey vs. Baldwin, 26 Pac. Rep., 908.

People ex rel. vs. Erie Railway Co., 52 Barb., 105.

In *Utah & Northern Railway Co. vs. Fisher* (*supra*), which was a case involving the right to tax railroad

property, Mr. Justice Field, giving the opinion of the Court, said :

"The only answer of the plaintiff to th is viewis that, by the stipulation of the parties and the finding of the Court thereon, it appears that the railway and property which are taxed are situated within the boundaries of, and *upon the Reservation.* If this be so, it does not follow that the result would be changed. The moment that the road was lawfully constructed it came under the operation of the laws of the Territory."

In *Truscott vs. Hurlbut Land and Cattle Co.* (*supra*), it was held that the cattle of an Illinois corporation, grazed upon an Indian reservation in that State, were taxable for State and all county purposes, the Court in the opinion saying :

"We are unable to see any good reason why the authority of the State, and its subordinate subdivisions, the counties, may not also include the taxation of all such personal property found within their geographical limits, although upon the reservation in question, provided, as in this case, the Indians are in no way interested in it."

The record in the Arizona case shows that both the county and territorial taxes were sustained.

II.

Where unorganized territory is attached to an organized county for judicial and revenue purposes, the unorganized territory is within the legal boundaries of the organized county.

"Pro hac vice the boundaries of the latter are enlarged so as to include the former, it is tantamount to this; one part of the statute gives the territorial boundaries, the other provides what shall be for certain purposes the legal boundaries."

In *Union Pacific Railroad Company vs. Peniston*, 18 Wall., p. 5, it appears that Lincoln County, Nebraska,

levied taxes upon the railroad as follows: Within the *geographical boundaries* of Lincoln County, eight miles; in Cheyenne County (unorganized), 105 miles; in the unorganized country between said counties, sixty-three miles. The Legislature of Nebraska by statute provided (Laws of Nebraska, 1868, p. 249):

"That all the unorganzied country lying west of the western boundary of Lincoln County and east of the east line of Cheyenne County, and south of the North Platte River, be and the same is hereby *attached* to the said County of Lincoln for *judicial* and *revenue* purposes, and that the County of Cheyenne, be and the same is hereby attached for judicial and revenue purposes to the said County of Lincoln."

It will be observed that practically the same question is presented in this case, as the one in the case at bar.

In the Nebraska case the unorganized country was attached to Lincoln County for judicial and revenue purposes by an Act of the Legislature, while in the case at bar, the unorganized country is attached for judicial purposes by an Act of Congress through the Territorial Supreme Court, and by an Act of the Legislature for revenue purposes.

Mr. Justice STRONG, who delivered the opinion of the Court, says:

"It remains only to notice one other position taken by the complainants. It is, that if the Act of the State under which the tax was laid, be constitutional in its application to their property within Lincoln County, the property outside of Lincoln County is not lawfully taxable by the authorities of that county under the laws of the State. To this we are unable to give our assent. By the Statutes of Nebraska the unorganized territory west of Lincoln County, and the unorganized County of Chey-

enne, are *attached* to the County of Lincoln *for judicial and revenue purposes.* The authorities of *that County, therefore, were the proper authorities to levy the tax upon the property thus placed under their charge for revenue purposes.*" (The italics are ours).

In *Philpin v. McCarty*, 24 Kan. 393, it appeared that Sequoyah County, an unorganized county, was attached to the organized county of Ford for judicial purposes. Judge Brewer, (now Mr. Justice Brewer) in giving the opinion of the Court says: (p. 404).

"Again the act combines the division of the State into counties, and the definition of their boundaries, with general provisions for enforcing the laws in such of these counties as are yet unorganized.

"These provisions are that, for certain purposes, the unorganized shall be deemed parts of the organized counties.

"*Pro hac vice* the boundaries of the latter are enlarged so as to include the former. It is tantamount to this: One part of the statute gives the territorial boundaries, the other provides what shall be, for certain purposes, the legal boundaries."

In *Comm'rs. of Marion Co. vs. Comm'rs. of Harvey Co.*, 26 Kan. 181, speaking for the Court with reference to the liability of a detached territory for a county indebtedness incurred previous to the detachment, he says:

"This detached territory stands to Marion County in reference to this indebtedness precisely as though it remained still a part of such county, and we do not understand that the owner of one tract of land in a county can object to the payment of a tax levied upon his land on the ground that the other land owners, etc."

In *Hilliard vs. Griffin*, (Iowa), 33 Northwestern Reporter, 156, it is said:

"ROTHROCK, J.: The County of O'Brien was organized in the month of February, 1860. Prior to that time the territory comprising that County was attached to the

County of Woodbury for revenue, election and judicial purposes. The taxes for the years 1858 and 1859, in the unorganized territory, were assessed and levied by Woodbury County; and by Section 226 of the revision of 1860, it was provided that 'unorganized Counties and other districts now or hereafter annexed to any organized County for judicial, electoral or revenue purposes shall, for these purposes, respectively be deemed to be within the limits of the County to which they are or may be so annexed, and to form a part thereof, unless otherwise provided by law.' So far, then, as the taxes for the years 1858 and 1859 are involved, they were legally levied by Woodbury County. By the statute then in force the taxes were required to be levied and the tax-lists delivered to the County Treasurer by the first day of November of the year in which the levy was made, and taxes became delinquent on the first day of February following. Under the law the taxes in question for the year 1858 were delinquent on the first day of February, 1859, and the tax of 1859 became delinquent on the first day of February, 1860.

"The County of O'Brien was not organized until February, 1860, and all these taxes were then unpaid, past due and delinquent.

"When the levy was made, the land in controversy was, by the express provision of the statute above cited, *in Woodbury County.*

"It was subject to taxation in that County, the same as any other land in the County. In making the estimates of the amount of taxes necessary to be levied for all lawful purposes, this land was included the same as other lands, and the taxes, when levied, became the source from which Woodbury County discharged its obligation to the State for the revenue due to it, and to the various purposes for which taxes may be levied. Whether the right to these taxes could be divested by legislative authority, we need not determine. It appears to us very clear that, without an express act of the Legislature, there was no power in the offices of the new County over the taxes in question. They were past due, delinquent, and collectible in Woodbury County, and belonged to that County. There appears to be no doubt

as to the correctness of this proposition." (Citing authorities).

In *ex parte* Crawford, 11 N. W. Rep., 494, it appears that one Jesse Crawford was convicted of the crime of murder committed in that portion of the unorganized territory of the State attached to the organized County of Holt, and made application for a writ of *habeas corpus* on the ground that the District Court of Holt County had no jurisdiction to try the offense. The writ was denied, the Court in the opinion saying:

"By Section 10, Article 6, of the Constitution, the unorganized territory west of the Sixth Judicial District is made a part thereof. This is supplemented by a legislative provision (Sec. 146, Chap. 18, Comp. Stat. 193), in these words: 'All counties which have not been organized in the manner provided by law, or any unorganized territory in the State, shall be attached to the nearest organized county directly east for election, judicial and revenue purposes,' " etc.

"Now, it happens that directly west of Holt there is no organized county; it is still unorganized territory. Holt, therefore, is the nearest organized county directly east of this territory, and consequently the one to which, by force of the statute just quoted, it is attached "for election, judicial and revenue purposes." As to these three purposes there are no restrictive or qualifying words in the act, but the attachment seems to be complete, and said territory, to all intents, made practically a part of that county.

Indeed, this effect is made still more manifest, if that be possible, by reference to the next section of said act, which provides that "the authorities" (of the county) "to which any unorganized county or territory is

attached, shall exercise control over, and their jurisdiction shall extend to such unorganized county or territory, the same as if it were a part of their own county."

The full extent of such jurisdiction and control can be correctly measured only by a resort to all of the various laws relative to county officers and their duties respecting election, judicial and revenue matters.

Would not this court also refuse a writ to a party convicted of an offense in this attached country by the District Court of Kay County, and would it not hold that by attaching it to Kay County for judicial purposes it became a part of that county, and that the objection that the petitioner was not tried by a jury of the county in which the crime was committed was not tenable?

In *Kemper vs. McClelland*, 19 Ohio 308, it appears that Indian country in the northwest part of that State ceded to the United States was "erected into fourteen separate and distinct counties," but left unorganized, of which Hardin county was one.

By an act passed January 17, 1826, the unorganized County of Hardin was attached to the organized County of Logan "for all the purposes of taxation." The law provided that where the taxable property of a county was less than $500,000, the levy for county purposes should not exceed five mills, and when over that amount not to exceed three mills. The valuation of each county was less than $500,000, and the valuation of both exceeded that amount.

The county commissioners of Logan County having levied a tax for county purposes of four and a half mills

upon the property of both counties, a tax deed for land in the unorganized county sold under this levy was cancelled, the Court saying:

"The question is now made upon the several statutes above referred to, whether the limit to the power of the county commissioners applies to counties attached, as well as to counties then acting separately; and we are of the opinion that the limit is the same in both cases, since the two counties make but one district for the purpose of taxation, their taxes being all levied and collected in common, and under the direction of but one board of commissioners. When the power of the commissioners is so limited, a tax of any greater amount is unauthorized and void. In every case where an individual tax is upon trial shown to be greater than the amount authorized, a sale of land for the payment of such tax, will be deemed void, and certainly a general tax must be void, when no power exists for levying it. It only remains to look at the proof and see if the present is such a case. The proceedings of the commissioners show that a tax of 4½ mills was imposed for *county purposes*; the certificate of the auditor of Logan County shows that the valuation for the two counties for the year 1830 was upwards of $537,000. That it was over $500,000 is taken for granted in the argument. The tax, therefore, could not legally exceed three mills on the dollar. As it was in this case 4½ mills, the tax sale in controversy, and the deed made in pursuance of it, were void."

In *Llano Cattle Co. v. Faught*, (Tex.) 5 S. W. Rep. 494, it appears that the unorganized County of Garza was attached to the organized County of Scurry for judicial purposes. The officers of Scurry County assessed and levied county taxes upon the cattle of plaintiff, a foreign corporation, kept in the unorganized County of Garza. Upon petition for an injunction against the collection of these taxes, the Court in the opinion says:

"No special provision of either organic or statutory law prescribes the place where personal property belong-

ing to a non-resident individual, or corporation, such as the appellant, shall be assessed, and the taxes thereon collected. Such property is therefore left to be governed by the general rule that all property must be taxed in the county where situated. Indeed, it would require special legislation, adopted by a two-thirds vote, to authorize the payment of such taxes at any other place, and then only at the office of the comptroller; and the power to have the assessment done elsewhere than in the county where the property is situated is withheld from the Legislature.

"The requirement that property shall be assessed, and the taxes thereon paid, in the County in which it is situated, cannot be literally complied with in the case of an unorganized county, if by being taxed in the County is meant the assessment and collection by officers who reside and have their offices therein.

"This duty must necessarily be performed by the officers of some other County authorized to discharge these functions in the unorganized County." Injunction refused.

And in syllabus it is accordingly

"*Held*, that the unorganized County being in effect a part of the County to which it is so attached, the collection of taxes on such personality of a non-resident may be enforced by the tax collector of the latter County."

The same Court in the case of *Hardesty vs. Fleming*, 57 Tex., 395, subjected the personality of a non-resident situated in an unorganized County to assessment, and the collection of taxes due upon the same in the County to which it was attached for judicial purposes.

To the same effect is

Township of Comins vs. Township of Harrisville, 45 Mich., 442;

Roscommon vs. Midland, 39 Mich., 424;

Board of Comm'rs vs. Northern Pac. R. Co., 25 Pac. Rep., 1058.

In international law it is held that the jurisdiction of one sovereign State is projected into the capital and parts of another; as in the case of ambassadors and men of war. True, the statutes of Iowa provide that in the case of attachment for judicial, revenue, *or* election purposes, the unorganized County is to be deemed within the organized County; this is but a legal conclusion, the result of an abundance of caution. It follows as a matter of law, as in the Ohio case, the Texas case, the Michigan case, the Montana case, the Nebraska case, as there can be no electors on these Reservations, an attachment for election purposes would be useless, and dangerous to good government.

III.

In the absence of Constitutional prohibition, it is the right of the State or Territorial Legislature to provide for the taxation of all property situated within the legal boundaries of its organized counties, for all county purposes, even though certain individuals in, or certain parts of particular counties, do not receive their share of the benefits resulting from the expenditure of the taxes so collected.

"The basis of apportionment which is fixed upon by the general rule must be applied throughout the district. There can not be two rules of apportionment for the same tax in the same district. If there could there

might be any number, and in effect there would be none at all, and every man might be assessed arbitrarily." Cooley on Taxation, 2 ed. 245.

The Legislature can not vary this rule. Id. 245.

"It is no objection to a tax that the party required to pay it derives no benefit from the particular burden." Id. 3.

"The apparent equity of any particular exaction can not support it as a tax unless it is made in accordance with law; nor, on the other hand, can the seeming injustice of a levy actually authorized by law defeat it, provided it is made under such general rules as the wisdom of the Legislature has determined are needful and proper for the general good." Id. 3.

In *McFerron vs. Alloway*, 14 Bush., 580, it was held that an island in the Ohio river, nearer the Indiana than the Kentucky shore, was taxable for the payment of a public debt incurred in aid of a railroad, though it did not and could not receive any benefit from the railroad. It was sufficient that it was within the taxing district.

In *New York, L. E. & W. R. Co. vs. Commr's of Marion Co.*, 27 N. E. Rep., 548, it is said:

"Counsel for plaintiff in error have criticised the law (the one mile assessment act) with extreme severity, and demonstrate in the case of plaintiff in error and others in like situation it compels a heavy contribution to the costs of an improvement from which they derive very little if any benefit. This, however, is not a test fatal to the power of taxation. If the object is in its nature public, it is not necessary to the validity of a tax levied to accomplish it that persons or property taxed therefor should be directly or pecuniarily benefitted thereby. (Cooley Const. Lim. 587). * * * The taxing district being constitutionally and legally created in the exercise of the general power of taxation, as distinguished from the power of local assessments, it follows that the tax is valid if the constitutional rule of equity has been observed in making the levy."

In *People ex rel. The Pacific Mail Steamship Co. vs. Comm'rs. of Taxes, etc.*, 58 N. Y. 242, it was held that where steamships were registered at the port of New York, and then sent to the Pacific ocean where they were to permanently remain in its trade, and had never returned, and where they were when the assessment and levy complained of was made, they were taxable in the city and county of New York, neither the residence of the owner nor the location of the ships having anything to do with their place of taxation. The Court cited *Hays vs. The Pacific Mail Co.*, 17 How. 596; *Morgan vs. Parkham*, 16 Wal. 471.

We think there can be no doubt but what the owners of the ships, and elevators, and boat-houses, and bridges, and all the vast property upon the oceans and upon, and in, and under the lakes and rivers of this country can prove that neither they, nor their property, receive any benefit from many of the levies made for city county and State government; and that it is upon an element, and in a part of the taxing district (as a river or lake) which can derive no benefit from the taxes, as for instance, roads, sprinkling, street cleaning, street lighting, and where the policeman cannot make his rounds. But the wisdom of the law is greater than that of any man, and time and experience will demonstrate that its "presumptive benefit" is nearer the actual benefit than "competent and material testimony" can prove in any case.

In *Board of Comm'rs. v. Northern Pacific R. Co.* 25 Pac. Rep. 1058, where the Crow Indian reservation was in Custer County but had been attached for "judicial purposes," and judicial purposes only, to Yellowstone

County, it was held that it imposed practically all of the expense of government upon Yellowstone County; yet as the Court could not find any *intention* upon the part of the legislature, to attach it to Yellowstone County for revenue purposes, Custer County could tax it. The Court saying:

"Custer County takes the fruits of the land in the way of taxes and leaves to Yellowstone the labor and expense of maintenance. This injustice is so glaring and absurd that it demands immediate legislative remedy. That remedy is not at the hand of this Court, and we can do nothing but affirm the judgment."

It would appear from this opinion that an attachment for "judicial purposes only" would morally entitle the county to all county taxes; and further in giving all the county taxes to Custer County the Court, and the attorneys for the Northern Pacific overlooked the contention of appellees herein, that the want of benefit released from taxation.

The rule which by the weight of authority applies to cities, to-wit: That they can not extend their limits so as to include farms and property beyond their actual enlargement, as shown by their houses, their streets, and their people, and entirely beyond the range of their protection and facilities, has no application to counties

Cities were not created for the purpose of governing the entire State or putting into effect State laws, but for the local government and protection of populous and compact communities. The territorial extent to which they might be safely intrusted with this form of local government, made necessary by their compact population and peculiar interests, and to which it is possible

for this local government to be beneficial, is readily apparent by the actual limits of the city as shown by its houses and its streets. And when the city goes beyond this it is in the first instance transcending its authority.

But we are satisfied that the authorities are uniform that no such limitation applies to counties, or to the Legislature, in conferring upon all the people of a State or Territory the blessings and protection of county and State government, for it is only through the counties that the State or Territory can supply governmental protection and vigor to all its people, as the heart supplies life and vigor through the arteries to all parts of the body. As well say that some parts of the body might go without blood, and the body be healthy and sound, as to say that some parts of the State or Territory should go without the benefits of county organization and county government, and the State or Territory be politically healthy or sound.

No such manifest limitation of benefits applies to county government. Every person in every nook and corner of the State or Territory, has a vital interest in the maintenance of, and the furnishing of facilities to, courts, and schools, and poor houses, and insane asylums, and all the objects for which county government was established. And this can be done as well by attaching them to an organized county as was done by Congress in attaching this Indian country to Kay County for judicial purposes, as by running the geographical lines of the county around them.

And even as to cities, if the property taxed is within

the city for any of the city's taxable purposes it is there for all.

The Courts have not the facilities for measuring the benefits, or want of benefits of any particular tax—what suit at law or bill in equity would lie; what evidence would be admissable; when must the county be able to show that the benefit has or would attach; how much must the benefit be?

The cost of adjudicating the benefit would be more than the tax, and in addition to the fact that the fundamental law has left the determination of such questions with the Legislative Department, it would result in breaking down the entire fabric of city and county government. Each taxpayer would be entitled to his week in court to show the benefit or want of benefit to his farm. That measured by benefits he was in some other county or out of the taxpaying world entirely. It was for the purpose of avoiding such questions as these that county lines were established. Even as applied to cities, if one levy is good all are good.

In *State vs. Brown.* (N. J.) Atl. Rep., 772, the Court says:

"Inequality is the rule arising out of the inevitable variations of personal environment. Hundreds are assessed in a city for the expense of electric lights, who have to content themselves with gas, or nothing; for sewers, when no sewer runs within a mile of their property; for public parks which are located on the opposite side of the city and are practically unreachable for the purposes of recreation; and for police, when such an officer is rarely visible. Many of the levies for the support of these and similar features of municipal government are as inequitable as the levy of urban taxes upon rural property. It has never been successfully urged that because of the inequality of return the tax was in-

equitable. The Courts which have enjoined the collection of taxes upon agricultural land assessed for municipal purposes have not intimated that they would entertain jurisdiction of cases of taxation where there was some but not an adequate benefit. This was a ground set up in the case of *State vs. Collector*, 39 N. J. Law, 75, against an assessment for taxes made upon property situated within the limits of a district under control of a municipal corporation known as The Long Branch Police, Sanitary & Improvement Commission. It was insisted that the prosecutor in that case was not liable to be taxed for police, fire department, or lighting streets, because his property was some distance from street lights, police patrol and the depository of the fire apparatus, and, therefore, he could have no benefit from them. It was held that these facts presented no ground upon which the taxpayer could be relieved from his assessment."

In *St. Louis Bridge Co. vs. City of East St. Louis et al.*, 12 N. E. Rep., 723, it is said :

"SHOPE, J.: This was a bill for injunction to restrain the collection of the city taxes levied and assessed by the corporate authorities of the city of East St. Louis for the year 1885, upon all that part of the bridge across the Mississippi, and connecting the cities of East St. Louis and St. Louis, between the west line of Front street, in the city of East St. Louis, and the middle of the Mississippi. Plaintiff in error, a corporation existing under the laws of the State of Missouri, became the owner of the bridge and its approaches in 1879; and as such owner exhibited this bill in the Circuit Court of St. Clair county, where, on demurrer being interposed, the bill was dismissed, and the record is brought to this court by writ of error. It appears from the bill that the bridge and approaches are within the city limits of East St. Louis, which extend westward to the boundary line of the State, to-wit: the middle of the Missippi river; but that a great part, and the most valuable part, of said bridge structure, is west of the east bank of the Mississippi river, and west of the west line of Front street, in the city of East St. Louis, and is in and over the Missis-

sissippi river, and upon territory not in any way improved or even improvable on the part of the said city of East St. Louis. * * * That that part of the bridge eastward of the western boundary of the State and city, in and over the Mississippi river, and on land covered by that river, which, for that reason, could never be used by the city for any purposes of improvement, is three times more valuable than that part of the bridge structure within the improved and improvable part of the city. * * * That in the preceding ten years plaintiff in error has paid city taxes upon such bridge structure to the amount of $125,000; that it has not, during that time, derived any protection for any part of the bridge structure from the municipal corporation, nor has a dollar of the heavy taxes it has paid to the city been by the city spent for the use or protection of the bridge; that plaintiff in error has, at heavy expenses, lighted the bridge and approaches, policed it with its own police force; built and maintained its own water works, laying pipes, erecting water and fire plugs, not only on its own structure, but under and along the streets of the city; maintained its own apparatus for extinguishing fires, the city having no fire department; sprinkled the bridge and approaches, cleaned its roadway and the city's streets and dykes leading to the bridge, to accommodate the team bridge traffic; employed physicians and provided hospital accommodations for its injured employes. * * * That as to all that part of the bridge beyond the western line of Front street, and which is situated in and over the Mississippi river, the city tax was illegally and unconstitutionally levied."

The Court, after showing among other things that the fact that this bridge is in a part of the taxing district covered with water; that the fact that it is not and can not be laid out into streets, or improved, or any part of the city's taxes expended therein; that none of these things invalidate the taxes that "the uniformity required by the constitution would be flagrantly violated if the property of plaintiff in error within the jurisdiction of

East St. Louis was not required to bear the same burden imposed upon other property within the same jurisdiction, says:

"Assuming that in the last ten years plaintiff in error paid taxes to the city aggregating $125,000, no part of which was expended in protecting the property of plaintiff in error taxed, is that a sufficient reason why this tax should be enjoined? Can relief against corporate taxation be predicated upon so illiogical a position? Manifestly not. * * * It is no valid objection to a tax levied for corporate purposes upon property subject to taxation that the property owner can not see that his property is benefited or protected by the expenditure of the fund, or that it does not in fact derive any appreciable benefit therefrom. * * * So here, while this bridge remains within the corporate limits of East St. Louis, it will be subject to taxation for corporate purposes uniformly with other property within the same jurisdiction; and this will be so although it may not be appreciably benefited by the particular municipal purpose or improvement for which the tax may be expended."

It was certainly the intention of Congress in its grant of legislative power in the Organic Act, as it has been adjudged to be in the other Territories under acts substantially the same, to confer this power of putting into force throughout every nook and corner of the Territory the benefits of county government, and the attempts of the Courts to interfere with the authority of the legislative department in this regard presents constitutional objections which we believe are absolutely unsurmountable.

Once the property is within the legal boundaries of the county the law presumes benefit, and presumptive, not actual benefit to the tax-payer, is the foundation for the levy of taxes as distinguished from assessments for

local improvements, and the tax-payer will not be permitted to show that this presumption is not true. His appeal is to the legislature which enacted the law, and where alone it properly belongs. As was said in *Kelley vs. The City of Pittsburg*, 104 U.S. 658, speaking of the want of benefit from particular levies:

"Clearly these are matters of detail within the legislative discretion, and therefore of power in the law-making body within whose jurisdiction the parties live. This Court cannot say in such cases, however great the hardships or unequal the burden, that the tax collected for such purposes is taking the property of the tax-payers without due process of law."

The petition in this case alleges, that this attached territory "is comprised wholly of lands owned, paid for and occupied by said Indian tribes, and consists principally of wild, unimproved and unallotted lands, which said wild, unimproved and unallotted lands which were not needed for allotment have been leased to these plaintiffs for grazing purposes. * * * *

"That these plaintiffs, during the year 1895 and during the month of April of said year, at the commencement of the grazing season drove, transported and shipped to the ranges and pastures in said Indian Reservations, large herds and quantities of cattle, which were taken on to said Reservations in pursuance of and by virtue and authority of said leases with the said Indian tribes, together with other articles of personal property necessary and needful in herding, grazing and caring for said cattle, and that the said plaintiffs did not at any time have any other personal property during the year 1895 upon said Indian Reservations." (Record, p. 9.)

If the Assessor went to these Reservations on the first of February, (the day on which the assessment begins in the organized counties) he would find comparatively little property; but after the grazing season begins, in April, they are full of property.

This, with the practice of purchasing cattle after February 1st and shipping them into the Territory, and upon these Reservations, the difficulty and expense of making assessments in this wild country in the winter time, and other reasons which might be mentioned, no doubt compelled the legislature to fix the taxable status of persons and property upon these Reservations as of May 1st, instead of February the 1st, as in the organized counties. And this difference in circumstances, we believe the Court will find, amply justified and made just and reasonable the Act of the Legislature in this regard. And it was in the province of the Legislature to pass upon all questions of fact involved in the passage of this Act. (Cooley on Taxation, 2d Ed., p. 150.)

Nor is it necessary that all property of a tax-payer, or all the property in a county, should be assessed at the same minute of time or on the same day. This would be impossible. The laws of the States generally give the assessor from two to six months in which to make the assessment, and surely that part of the county which is assessed last cannot avoid paying its taxes on the ground that the assessor called in that neighborhood two months after he assessed some other part of the county. So that the various constitutional and State statutes requiring uniformity in taxation cannot be held, or intended to apply to the date at which the listing and ap-

praisement is made. Cooly on Constitutional Limitations 5 Ed., side page 513, says:

"It will be apparent from what has already been said that it is not essential to the validity of taxation that it be levied according to rules of abstract justice. It is only essential that the legislature keeps within its proper sphere of action, and not impose burdens under the name of taxation which are not taxes in fact; and its decision must be final and conclusive. Absolute equality and strict just are unattainable in tax proceedings. The legislature must be left to decide for itself how nearly it is possible to approximate so desirable a result. It must happen under any tax law that some property will be taxed twice, while other property will escape taxation altogether. Instances will also occur where persons will be taxed as owners of property which has ceased to exist. The system in vogue for taking valuations of property fixes upon a certain time for that purpose, and a party becomes liable to be taxed upon what he possesses at the time the valuing officer calls upon him. Yet changes of property from person to person are occurring while the valuation is going on, and the same parcel of property is found by the assessor in the hands of two different persons, and is twice assessed while another parcel for similar reasons is not assessed at all.

Then the man who owns property when the assessment is taken may have been deprived of it by accident or other misfortune before the tax becomes payable; but the tax is nevertheless a charge against him. And when the valuation is only made once in a series of years the occasional hardships and inequalities in consequence of relative changes in the value of property from various causes become sometimes very glaring. Nevertheless, no question of constitutional law is involved in these cases, and the legislative control is complete."

These people are not injured by this difference in the date of the assessment.

Take a man with, say one hundred head of cattle in Kay County proper on February 1st, the date of the assess-

ment there, and one of these appellees with one hundred head of cattle in this attached country. When the assessor called on the man in Kay County on February 1st, he assessed not only his hundred head of cattle but he assessed to him all the hay, corn, oats, and fodder which he had on hand to feed his cattle until "the commencement of the grazing season." Not only that, he assessed all the money he had on hand to pay for his hands to take care of the cattle, and all the money he had to take care of himself and family during that time. When he called on the man in this attached country on May 1st, he found that his hundred head of cattle had eaten up all the hay, and corn, and oats, and fodder necessary to their support during February, March, and April, and that the man had spent all the money necessary to pay hands, and to support himself and family during said months. It amounts simply to this: the feed and money which the assessor would have found and assessed on February 1st, reappears on May 1st, in the form of beef, and is assessed as such, and hence the allegation in plaintiff's petition. The Court can readily see the discrimination is more apparent than real.

A uniform valuation is not necessary if a just valuation is obtained. *Louisville, etc., R. R. Co v. State*, 25 Ind. 177; Am. & Eng. Ency. of Law, vol. 25, p. 56. But under the authorities if it did make a difference it would not invalidate the tax.

Bearing in mind the familiar principle in the law of taxation that, the whole State is but one taxing district for State purposes, the county but one taxing district for county purposes, etc., (Cooley on Taxation, p. 244), it is provided

by law in the State of New York that assessments of the real and personal property in the City and County of New York for State, city and county purposes shall be made between the first Tuesday of September and the second Monday of January; and the taxable status of persons and property therein determined as of the second Monday in January. In the other counties outside of the City and County of New York the statute provides that the assessments shall be made during the months of May and June, and the taxable status of persons and property fixed as of the first day of July; and this wide difference in time in the making of assessments for State taxes—in the same taxing district—is held legal. *The People ex rel. vs. The Com's of Taxes, etc.*, 91 N. Y., 593, and cases cited therein.

Assn. for Colored Orphans vs. Mayor, etc., 104, N. Y., 581.

People vs. Spring Valley etc., 92 N. Y., 383.

In Missouri the law provided that real property should be assessed every two years in all counties outside of St. Louis, and that all property in the City of St. Louis, and that portion of the State embraced within its limits, should be assessed every year for State and municipal taxes. In *State vs. Lindell Hotel Co.*, 9 Mo. Appeals, 450, this difference in the time of assessments was held legal, although in this case it made a great difference in the amount of taxes.

The Legislature of Wisconsin passed an Act fixing the first day of April as the date when saw logs belonging to non-residents of the State should be assessed for taxation, while the time fixed in the general revenue law

for assessing the saw logs of residents was fixed on May 1st.

Justice Bunn, in passing upon and sustaining the legality of the statute, said :

"It is claimed, first, that this law violates the principal of uniformity in providing for an assessment of the logs of a non-resident at a different time than that provided in the case of residents; second, that for the same reason it discriminates unjustly against non-residents. But I am of the opinion that the case does not come within either of these principals.

"The Constitution provides that the rule of taxation shall be uniform. This would be the law if there were no Constitutional provisions on the subject. It is of the very nature of a tax that it should be assessed according to some uniform rule; otherwise it would be confiscation, and not taxation. But this does not mean that the time and method of assessment shall be identical, but only that after the Legislature has declared what classes of property shall be subject to taxation, the tax itself shall be levied upon such property or the owner thereof according to a uniform rate of valuation. It is not denied that this has not been done in this case. Indeed, so far from setting up one standard of valuation for one class of persons and another for another class, possessing the same kind of property, the purpose of the law would seem to be to bring about that substantial equality in taxation which the common law, as well as the Constitution, requires. The Legislature was aware that the logs of non-residents, as well as resident owners, were liable to be floated out of the State in the month of April, etc."

Nelson Lumber Co. vs. Town of Loraine, 22 Fed. Rep. 54.

This Court has held that the assessment of merchants' stocks by the monthly average of the amount on hand is legal, and commend the method, though a different rule applied as to the rest of the property in the State.

Shotwell vs. Moore, 129 U. S., 590.

That a different time and method of assessing railroad property from the time and method of assessing other property in the State is legal. "Kentucky R. R. Tax Cases," 115 U. S., 321. Most of the States provide by statute, as does Oklahoma, for a different date in assessing real estate from that of assessing personal property, even where the State Constitution provides for uniformity in taxation; and this, under the authority, is held legal. *Wisconsin Cent. R. Co. vs. Lincoln Co.*, 15 N. W., 121.

In *St. Louis I. M. & S. Ry. Co., vs. Worthen*, 13 S. W. Rep., 254, it appeared that railroad property was classed as real estate for the purposes of taxation, and the law provided that real estate should be assessed every two years; a special provision of the statute provided that railroad property should be assessed every year. This discrimination was held not to avoid the tax on railroads nor to conflict with the Constitution of the State providing that "the value of property assessed for taxation shall be ascertained in such manner as the General Assembly shall direct, but shall be equal and uniform throughout the State."

The following decisions clearly establish the right of the State or Territorial Legislature to provide for different dates in the assessment, and that the rule of uniformity, as said by Judge Bunn, (*supra*) has no application to the date of the assessment.

Wisconsin Cent. R. Co. vs. Lincoln Co., 15 N. W. Rep., 121.

Comm'rs etc., vs. Nelson, 19 Kan., 234.

C. C. C. &c. Ry. Co. vs., 18 L. R. A., 740.

People vs. Henderson, 21 Pac. Rep., 144.

The claim of plaintiffs that the Act fails to provide for the taxation of real estate on the Reservations, to-wit: railroads, is untenable.

The grant to the railway took it out of the Reservation. *Maricopa &c. Ry. Co. vs. Arizona*, 156 U. S., 347. And the Statutes of Oklahoma (Laws 1895, Sec. 3, Art. 4, Chap. 43,) provides that railroad property is personal property for the purposes of taxation.

The petition of plaintiffs states that most of their property was brought in after March 1st, and under the circumstances, it would be taxable under Art 5, Chap. 43, Laws 1895, (Appendix page 44) even though the assessment was illegal.

It is not necessary that the people on these Indian reservations should have the right to vote for the election of either the county or Territorial officers before they can be taxed.

These reservations are set apart as "a permanent home" for the Indians under treaty stipulation, and this provision is incompatable with the idea that it can become the permanent home of white citizens of the United States. This court will take judicial notice of the fact that no one can loose his domicile or residence elsewhere and acquire one upon these reservations. Sec. 2118, Revised Statutes U. S., provides: "Every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe * * * is liable to a penalty of one thousand dollars," and every person other than an Indian who

goes upon them, can only do so by permission of the United States authorities for a particular temporary purpose; and that for a limited time.

As was well said in *State ex rel. Dollard vs. Board of County Commissioners*, 46 N. W. Rep., 1127:

"The entire Indian reservation of which these counties formed a part was a segregated territory, in which no person could acquire any political rights, nor had the legislature power to confer any."

Even if they were not Indian reservations still the legislature would have the right to attach them to Kay County, and levy and collect taxes for all county purposes, upon all the property other than Indian found therein, and yet prohibit the inhabitants from voting for any or all the county officials. The Kansas Statute, (*supra*), Sec. 1610, Gen. Stat. 1889, after providing for the attaching of unorganized counties to organized counties for judicial purposes, provides:

"That in no case * * * shall its (the unorganized counties) electors have the right to vote on the election of county officers or representatives within or for such organized county."

And yet the organized county to which an unorganized county is attached has the right to levy all county taxes under this statute, on all the property in the unorganized county for the same purposes, and to the same extent as though the unorganized county was within the geographical boundaries of the organized county. *Ayers, et al. vs. The Board of Commissioners, etc.* 37 Kan. 240. And this act is constitutional. *Philpin vs. McCarthy*, 24 Kan. 393.

In *Loughborough vs. Blake*, 5 Wheaton, 317, this Court held that Congress could levy direct taxes upon the

people of the District of Columbia, and the Territories, although they had no representative in that body. It was not taxation without representation. Chief Justice MARSHALL pointing out what that expression meant, among other things showing that a Territory is in a state of political infancy and advancing to its destined position of Statehood. This unorganized territory is in a state of infancy. It can not take care of itself, and a glance at the conditions will show that good government demands that the elective franchise, at least for the present, be withheld.

The Governor, Judges and all the Territorial officials are appointed by the President, yet the people of Kay County have to pay Territorial taxes. When the people rushed into Kay County on September 16, 1893, they found a full corps of county officials appointed by the Territorial Governor, and these county officials levied and collected county taxes for all county purposes from them. (Cooley on Taxation, page 59.)

At the time of the Revolution not to exceed one-tenth of the population in England had a right to vote, and neither the inhabitants in, or the cities of Leeds, Halifax, Birmingham, nor Liverpool had a vote for, or a member of Parliament, and yet they were taxed like all the rest of the people. And this was not taxation without representation. "The Literature of the American Revolution," by Prof. Tyler, cited in "The Literary Digest" of July 3rd, 1897, page 281.

The statute under consideration is not open to the objection that it is local or special legislation. It applies to all unorganized country, districts and reservations

in the Territory, present and prospective. It applies to all of a class, and the circumstances, and situation, and conditions of the unorganized country, districts and reservations are so marked, and so peculiar, as to make them a class unto themselves, and the rule of uniformity itself not only justifies, but imperatively demands, particular statutory provisions.

In *Edye vs. Robertson*, 112 U. S., 580, it is held that an Act of Congress which imposes upon the owners of vessels who shall bring passengers from a foreign port into a port of the United States, a duty of fifty cents for each passenger not a citizen of this country, is not void as against the Constitutional rule of uniformity, because it does not apply to passengers brought in by way of Canada or the Mexican border; the evil only existing on the coast where the subject of it is found.

In *Home Ins. Co. vs. New York*, 134 U. S., 594, 606, 607, speaking of tax laws, the Court speaking through Mr. Justice FIELD, says:

"Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the Statutes of New York all corporations, joint stock companies, and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class."

And this is true even where the State Constitution requires uniformity.

Pacific Express Co. vs. Seibert, 142 U. S., 339; "Kentucky Railroad Tax Cases," 115 U. S., 321.

In addition to what is so ably said in the opinion by Judge Tarsney (Record p. 41), and the authorities there cited, we would respectfully cite: *Rutgers vs. New Brunswick*, 22 N. J. Law, 53; Sutherland Stat. Con. S., 121 and 124; *Wheeler vs. Philadelphia*, 77 Pa. St., 336; *McAunich vs. Railroad Co.*, 20 Iowa, 338.

Appellants therefore pray that the decree be reversed, the injunction dissolved with directions to dismiss the petition; for costs, and for such other and further relief as may be just, equitable, and proper.

J. F. KING,

Counsel for Appellants.

APPENDIX TO BRIEF.

Statutes of Oklahoma Concerning Taxation.

SESSION LAWS OF OKLAHOMA, 1895.

CHAPTER 43.

ARTICLE 6.—PROPERTY TAXABLE IN TERRITORY ATTACHED FOR JUDICIAL PURPOSES.

AN ACT to amend Section 13, Article 2, of Chapter 70, of Oklahoma Statutes relating to revenue.

Be it enacted by the Legislative Assembly of the Territory of Oklahoma:

SECTION 1. That section 13, article 2, chapter 70, of the Oklahoma Statutes relating to revenue, be and the same is hereby amended so as to read as follows:

SECTION 13. That when any cattle are kept or grazed, or any other personal property is situated in any unorganized county, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said county, district or reservation is attached for judicial purposes, and the board of county commissioners of the organized county or counties to which such unorganized county, district or reservation is attached shall appoint a special assessor each year whose duty it shall be to assess such property thus situated or kept; such special assessor shall have all the powers and be required to perform all the duties of a township assessor, and shall give a similar bond and take the same oath

as required of such township assessor, and receive the same fees as a township assessor, and the officer whose duty it shall be to collect the taxes in the organized County to which such country, district or Reservation is attached shall collect the taxes and is vested with all the powers which he may exercise in the organized County, and his official bond shall cover such taxes. The assessor herein provided for shall begin and perform his duties between the first day of April and the twenty-fifth day of May, in each year, and complete his duties and return his tax lists on or before June first; and said property herein authorized to be assessed shall be valued as of May the first in each year. That in case said property at any time has by oversight or negligence or for any other cause been irregularly, illegally or defectively assessed, it shall be lawful for the special assessor to assess or re-assess the same as the case may be and when done the same shall be valid for all intents and purposes, and in performing his duties under this section he may make out his assement roll or lists from the best evidence attainable. Any person who feels aggrieved by his assessment in any such country, district or reservation, may appear before the board of county commissioners for the organized county to which such country, district or Reservation is attached for judicial purposes at their session commencing on the first Monday in June, and the board of county commissioners shall have power to correct any and all errors and equalize individual assessments; *Provided*, that the assessed valuation of such attached territory shall in no case be taken as a basis for the creation of a bonded indebtedness of the county to

which it is attached or in estimating or limiting the same.

SESSION LAWS OF 1895, CHAPTER 43, ARTICLE 5.

SECTION 1. When any personal property shall be located in any county of this Territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September, such property is taxable therein for that year, and shall be assessed and placed on the tax roll and the tax collected as provided by this Act.

SEC. 2. Whenever any live stock shall be located in this Territory for the purpose of grazing, it shall be deemed to have acquired an actual situs therein as contemplated by this Act.

SEC. 3. When any person, association or corporation shall settle or organize in any county in this Territory and bring personal property therein after the first day of March, and prior to the first day of September in any year, it shall be the duty of the assessors to list and return such property for taxation that year unless the owner thereof shall show to the assessor, under oath, that the same property has been listed for taxation on that year in some other State, or county in this Territory, etc.

Supreme Court of the United States

October Term, [illegible]

A. M. [illegible], J. B. HART and H. D. GREENE, as the Board of County Commissioners of Kay County, Oklahoma Territory, et al.,
Appellants. — No. [illegible]

vs.

D. R. GAY and A. S. REED, Partners as Gay & Reed, et al.,
Appellees.

D. R. GAY and A. S. REED, Partners as Gay & Reed, et al.,
Appellants.

vs.

A. M. [illegible], J. B. HART and H. D. GREENE, as the Board of County Commissioners of Kay County, Oklahoma Territory, et al.,
Appellees. — No. [illegible]

Appeals from the Supreme Court of the Territory of Oklahoma.

Brief on Behalf of the Territory of Oklahoma.

HARPER S. CUNNINGHAM,
Attorney General of the Territory of Oklahoma.

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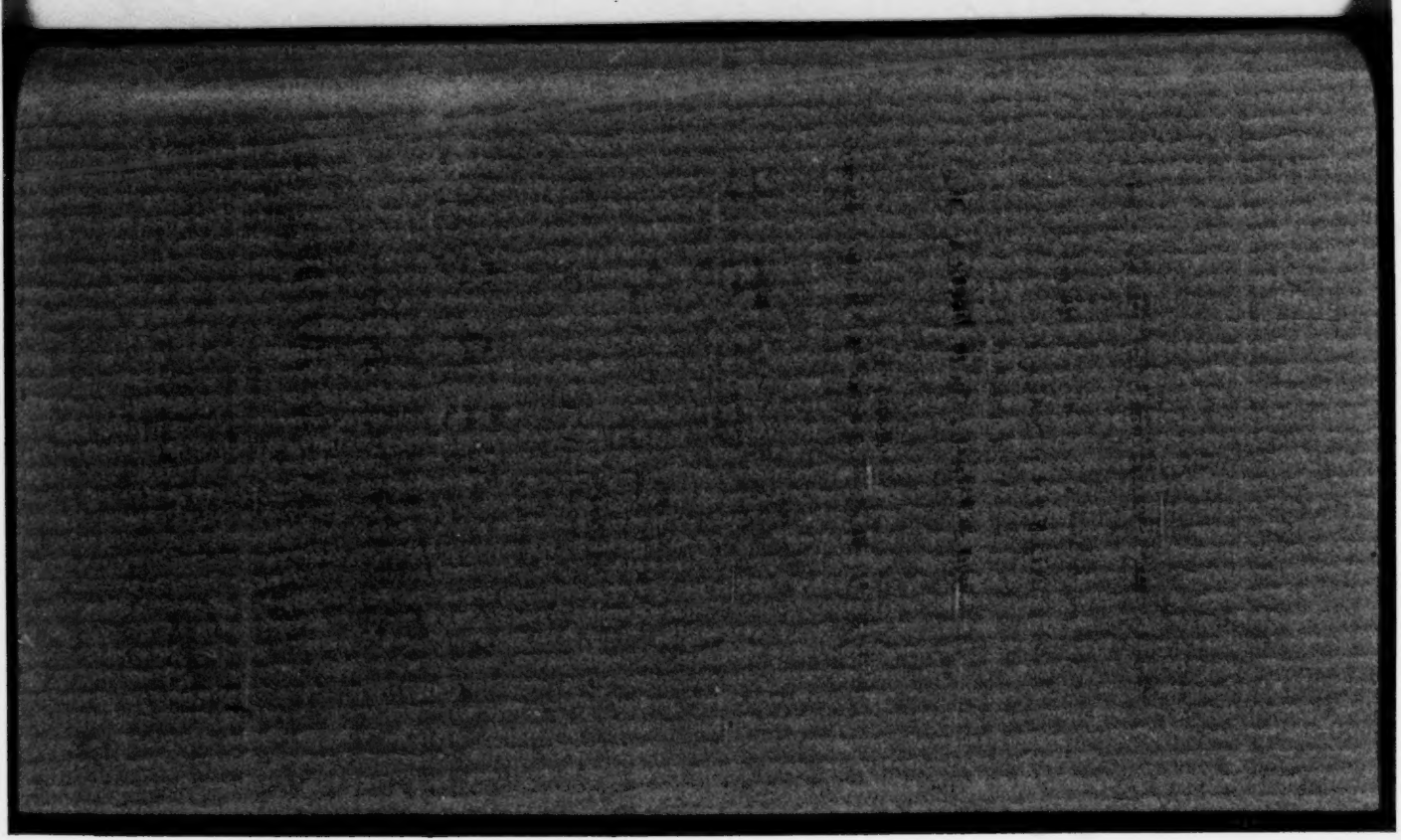

IN THE
Supreme Court of the United States
October Term, 1897.

A. M. THOMAS, J. B. HART and H. B. OWENS, as the Board of County Commissioners of Kay County, Oklahoma Territory, et al., *Appellants.*

vs.

D. P. GAY and A. S. REED, Partners as Gay & Reed, et al., *Appellees.*

No. 287.

D. P. GAY and A. S. REED, Partners as Gay & Reed, et al. *Appellants.*

vs.

A. M. THOMAS, J. B. HART and H. B. OWENS, as the Board of County Commissioners of Kay County, Oklahoma Territory, et al., *Appellees.*

No. 439.

Appeals from the Supreme Court of the Territory of Oklahoma.

Brief on Behalf of the Territory of Oklahoma.

STATEMENT OF THE CASE.

The statement of facts is fully set forth heretofore in the brief of Mr. King, in case No. 287, and the brief of counsel for the plaintiffs below and cross-appellants in case No. 439. The interest of the Territory of Oklahoma in these cases is in maintaining

the judgment of the court below, sustaining the validity of the territorial taxes, and on behalf of the Territory, this brief will be directed solely to that point.

ARGUMENT.

Counsel for the plaintiffs below and cross-appellants in the first and second propositions discussed, maintain the law to be that the Territory of Oklahoma has no power or authority to enact any law which would levy a tax upon property found or being in the Indian reservation described in the record, and in the third to the seventh propositions discussed by them they offer technical objections to the enforcement of the law requiring them to bear their fair share of the expenses.

The power of the Territory under Sections 4 and 6 of the Organic Act, to enact laws which extend over these reservations is fully supported by the authorities cited and discussed on page 33 of the record, to-wit:

Utah & Northern Railway Co. vs. Fisher, 116 U. S. 28.
Langford vs Monteith, 102 U. S. 145.
Phœnix & Maricopa R. R. Co. vs. Arizona Territory, 26 Pac. Rep. 310.
Maricopa & Phœnix R. R. Co. vs. Arizona Territory, 156 U. S., 347.
Torrey vs. Baldwin, 26 Pac. Rep. 908.
Gon-shay-ee, Petitioner, 130 U. S. 343.
Ex parte Crow Dog, 109 U. S. 556-560.
United States vs. Kagma, 118 U. S. 375.
United States vs. Pridgeon, 153 U. S. 48.

In addition to the above authorities we call

special attention to a late and exhaustive case decided by the Circuit Court of Appeals for the Ninth Circuit, *Truscott, County Treasurer, vs. Hurlbut Land & Cattle Co.* 73 Fed. Rep. pg. 60; s. c. 19 C. C. Appeals; pg. 374.

In the last mentioned case the court says:

"The cattle upon which the taxes in question were levied were grazing upon the reservation under lease from the Crow Indians, the sanction to which by the United States did no violence by the provisions of the treaty between the government and them. They were within the geographical limits of the state of Montana and of the county of Custer of that state, and were the property, not of the Indians, but of a corporation of the state of Illinois, and were confessedly liable to the taxes levied unless they were without the jurisdiction of the state of Montana. That they were not we consider very clear."

In *United States vs. Pridgeon, supra*, the court holds that the laws of Nebraska put in force in the Territory of Oklahoma by the Organic Act, applied to and were in force in the Indian reservations involved in this action, and quote with approval the opinion of the Supreme Court of the Territory of Oklahoma in *Ex Parte* Larkin, 1 Oklahoma, 53, 57, which is as follows:

"It was intended by Congress that the laws of Nebraska should constitute the Territorial Code, as distinguished from the Laws of the United States in force in the Territory of Oklahoma, and that they sustained the same relation to courts and to the people of the Territory and to the Legislative Assembly as a code of laws enacted by the Legislative Assembly."

Under the Organic Act of Oklahoma Territory, immediately upon the adjournment of the first session of the Legislature, December 24, 1890, the laws enacted by said Legislature and by all subsequent legislatures, became operative to the same extent as did the laws of Nebraska put in force by the Organic Act. There being no treaty stipulations between the Indian tribes and the government excluding the reservations involved in this action from becoming a part of the Territory of Oklahoma, by the Organic Act said reservations became a part of the Territory, which in principle has been decided by this Court in 116 U. S. 102 U. S; 153 U. S; 26 Pac. Rep. and 73, Fed. Rep. s. c. 19 C. C. Appeals *supra.*

In *Maricopa Co. vs. Territory of Arizona*, 26 Pac. Rep. 310, the court says:

"In the absence of treaty or other express exclusion, the different Indian reservations become a part of the Territory where situated and subject to the territorial legislative jurisdiction, subject, however, to the power of the general government to make regulations respecting Indians, etc."

This case was appealed to this Court and was affirmed, 150 U. S., pg. 349.

Plaintiffs below and cross-appellants assert that taxation of cattle kept and grazed on Indian reservations, as in this case, is a direct tax upon the right of the Indian tribes, and in support of their position cite the income tax case. This case, we insist, is not in point. On the other hand, the Circuit Court of

Appeals, in *Truscott vs. Hurlbut Land & Cattle Co. supra*, a case identical with the one at bar, says:

"The cattle here sought to be taxed, as has been said, were upon the reservations under lease from the Indians, sanctioned by Act of Congress, and it is impossible to perceive that any of their just rights under the treaty and agreements with them on the part of the United States can be impaired by subjecting complainant's cattle to taxation. In reserving lands for the exclusive and undisturbed use of these Indians, and for others who, with their consent and with that of the United States, shall occupy them, it was not the intention of Congress to establish an asylum into which persons, other than the Indians, whether natural or artificial, can take their property, and hold it exempt from its just proportion of the taxation necessary for the support of the government which gives it protection. For the protection of the complainant's cattle in all matters unconnected with the Indians the authority of the state of Montana is available."

Just so are the laws of the Territory of Oklahoma available for protection of the plaintiff's rights in the Territory of Oklahoma, and so, also, should they be required to contribute to the maintenance of its government.

The third contention of cross-appellants is that the Act of the Legislature authorizing the taxation is unconstitutional and void, in that it confers upon the Supreme Court of the Territory the right to fix taxing districts, which is a legislative function.

In anwer to this proposition we submit that the

decision of the Supreme Court of the Territory in this case is not only conclusive, but exhaustive in the argument upon this subject, in that the Supreme Court of the Territory has never attempted to fix any taxing districts; that the court under the powers expressly invested in it by the Organic Act of the Territory, in 1894, attached these reservations and unorganized country to Kay County for judicial purposes, and not for the purposes of taxation; that the taxing districts in which these taxes were imposed and levied were created and fixed, not by the Supreme Court, but by the Legislature in the Act of 1895, the language of the Act being:

"That when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation in this Territory, that such property shall be subject to taxation in the organized county to which said country, district or reservation *is* attached for judicial purposes."

It was by this Act that a taxing district was created, and not by the order of the Court.

We submit that the mere fact that the boundaries of the taxing districts are co-incident with the boundaries of the territory attached to Kay county for judicial purposes by the Supreme Court, would not justify the Court in holding that the Act was void.

We admit that the fixing of the taxing districts is a legislative function, but strenuously deny that the Legislature empowered the Supreme Court of the Territory to fix such districts. The Organic Act author-

izes the Supreme Court to fix the judicial districts, which it did, and the Legislature merely denominated the unorganized territory in the judicial district of which Kay County was a part as a taxing district to Kay County, and there is no difference in the description of the taxing unorganized district of Kay County than had the Legislature described it by metes and bounds just as the Supreme Court described it.

The legislative enactment, as above quoted, was that the unorganized country, district or reservation which was attached to Kay County, as well as any other unorganized country, districts or reservations, attached to other counties for judicial purposes, should constitute taxing districts, and, while it is true that the Supreme Court might change the judicial districts, the taxing districts, as created by the Act of the Legislature of 1895 would not be changed and can only be changed by further legislative enactment.

In *Ferris vs. Vennier*, 42 N. W. Rep. 34, a case similar in all particulars to the one at bar, except that the attached territory was not an Indian reservation, but was unorganized territory, the Supreme Court of Dakota Territory held that the levy for territorial purposes was a valid tax.

Unless cross appellants have "clearly and palpably" shown that the law complained of violates the Organic Act and the laws of the United States, they must fail in their contention. This they have not done.

"That the right to tax rests upon necessity, is in-

herent in every government and with us is in vested the legislative department, which possesses plenary power over the subject except so far as may be restricted by the constitution of the states or the United States, and it rests with those who allege the unconstitutionality of an act of the legislature to show clearly and palpably wherein it violates the constitution are fundamental principles, which can not be controverted."

Porter et al vs. R. I. & St. L. R. R, Co., 76 Illinois, 561.

As to the fifth contention, in addition to the exhaustive argument and the citation of authorities in the decision under consideration in this cause, we contend that the act of 1895 does relate to and cover all taxable and personal property in all unorganized country and on Indian reservations; that it is not special legislation within the meaning and prohibition of the Act of Congress of July 30, 1886. That the Act of 1895 provides as follows, page 232, Session Laws:

"That when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said district or reservation is attached for judicial purposes."

This embraces all classes of personalty. The language is so plain that it is not a question of construction, and following this provision the Act provides the manner of assessment, levying and equalizing the taxes assessed and levied.

As to this contention that it violates Section 6 of the Organic Act creating the Territory of Oklahoma by assessing these reservations on a different day from the assessment of like property in the County of Kay, it is based on misconception and misconstruction of said Act.

The provision of the Organic Act is that no "unequal discrimination shall be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

The sole fact on which appellants' counsel base this contention is that their property was valued as of May first; while similar property in the organized counties was valued as of February first. There is nothing in the letter or spirit of the Organic Act prohibiting this; only two discriminations are inhibited, one relates to the different kinds of property and the other requires that all property be taxed according to its value.

The question is not a new one, but has been frequently raised and uniformly settled one way until it is not now an open question. A leading case on the subject is that of *Land, Log and Lumber Co. vs. Brown*, 40 N. W. Rep. 882, also *Nelson Lumber Co. vs. Town of Loraine*, 21 Fed. Rep. page 54. This case involved the construction of a clause of the Wisconsin constitution similar to Section 6 of Organic Act of Oklahoma.

Under the Oklahoma Revenue Laws, real estate is valued as of January 1. Fixing the time of valuation is a matter of legislative discretion if there is no ex-

press provision on the subject in the Organic Act limiting it.

Judge Cooley in his work on taxation, page 149, says:

"When the nature of the case does not conclusively fix it, the power to determine what shall be the taxing district for any particular tax is purely a legislative power, and it is not to be interfered with except as it may be limited or restrained by constitutional provisions. The judicial tribunals can not interfere with the legislative discretion, however erroneous it may be."

The principle enunciated by Judge Cooley will apply to all other details not within express limitations; the fixing of districts and the time for assessing value in the attached country is a matter of legislative discretion. The only limitation being that all property shall be assessed according to its value.

This Court will take judicial cognizance as a matter of law that there is no taxable real estate in these Indian reservations on which a tax could be legally levied.

In the case of *Daily Leader vs. Cameron*, 3 Oklahoma Rep. 677, legislation as prohibited is fully discussed and passed upon. The case fully sustains our contention that the Act under consideration does not come within the prohibition of the Act of Congress.

Francis vs. A. T. & S. F. Ry., 19 Kansas. 303.
Sutherland on Statutory Construction, Sec. 124.
Wheeler vs. Philadelphia, 77 Pa. State Rep. 366.

McAunich vs. R. R. Co., 20 Iowa, 338.
State vs. Cooley, (Minn.) 52 N. W. Rep. 150.
Sutherland, Sec. 129.
Rogers vs.——————, 22 New Jersey Law, 53.

While the Act in question does not apply to all personal property within the *Territory* it does apply to all of a class within like circumstance, to-wit: to cattle kept, or any other kind of personal property, except that of Indians, *situated in any unorganized country, district or reservation*, and it seems is general in its application and can not be properly said to be local or special.

In the Wisconsin case *supra* Justice Bunn in passing upon and sustaining the legality of a similar statute to the Territorial Act of 1895, under discussion in this case said:

"It is claimed first that this law violates the principle of the uniformity in providing for the assessment of the logs of a non-resident at a different time than that provided in the case of residents; second, that for the same reason it discriminates unjustly against non-residents. But I am of the opinion that the case does not come within either of these principles. The constitution, says the court, provides that the rule of taxation shall be uniform. This would be the law if there were no constitutional provision on the subject. But this does not mean that the time and method of assessment shall be identical, but only that after the Legislature has declared what classes of property shall be subject to taxation; the tax itself shall be levied on such property or the owner thereof according to a uniform rate of valuation."

Nelson Lumber Co. vs. Town of Loraine, 22 Fed. Rep. 54.

Cross appellants' contention that the import of the law complained of in this action "is simply nothing more nor less than to tax domestic animals in those reservations, and will not admit of a construction broad enough to reach all classes of personal property, such as merchandise, choses in action, growing crops, household goods, farming implements and other property of like character."

The general Revenue Act of the Territory, Chapter 70, Article 1, provides for the taxation of all property, both real and personal, found in the Territory of Oklahoma, except such as is expressly excluded therefrom, and includes all the property above mentioned by cross appellants. The cattle in controversy are by said general Act made taxable, as are all other kinds of personal property found in Indian reservations. The Act complained of is simply an amendment of Section 13, of Article 2, of Chapter 70, and is, therefore, a part of the general revenue law; and when taken in connection with other parts of the same law, the expression "or any other personal property" can not be limited to cattle or property *ejusdem generis*, as is contended by cross appellants.

We maintain that the law complained of was intended to accomplish a dual purpose; first, to provide an assessor and for the assessment, the Indian reservation being unorganized territory. Second, with a view to assessing and levying tax upon cattle which

might be brought into and require a *situs* in such unorganized territory and reservations between the dates mentioned in the Act.

If by misconstruction of the law the special assessor, provided for in said Act, has failed to assess personal property in said reservation other than cattle, it can afford no reason for the Court to hold that a tax properly levied upon cross appellants' property should not be valid and collectable. Cross appellants' cattle were liable to taxation under Article 1 of the general revenue law above referred to, and under Section 13, of Article 2, above referred to the special assessor was fully empowered to make the assessment.

Cross appellants in their seventh and last proposition contend "that the 35 per cent addition to the assessed valuation of said property, by order of the Territorial Board of Equalization, is unauthorized and void."

In answer to this contention, without argument, we submit the question upon the unreported decision of the Supreme Court of the Territory of Oklahoma in the case of *Bullen vs. Wallace*, which we print in full. (See appendix.)

The Act of 1895 expressly provides for the equalization of individual assessments of property in unorganized country districts. The record fails to show that cross appellants ever attempted to avail themselves of this provision, and therefore they are not in

position to complain as to the valuation of their property.

For the reasons and upon the authorities given we insist that the territorial tax involved is valid, and that the decision of the Court below so holding should be affirmed. Respectfully submitted,

HARPER S. CUNNINGHAM,

Attorney General of the Territory of Oklahoma.

APPENDIX.

IN THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

J. R. Wallace, et al., Plaintiffs in Error, vs. H. B. Bullen, et al., Defendants in Error.

SYLLABUS:

1. *Injunction—Illegal Tax.* Injunction will lie in this Territory to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment or any proceeding to enforce the same. And without express statutory authority the general powers of a court of equity would be ample to afford such relief.
2. *Taxation.* The revenue laws of this Territory establish one system for levying and collecting taxes, and under such system all property is made subject to taxation and required to be assessed at its true value.
3. *Assessments.* The Township Assessor, Clerk and Treasurer compose a Board of Equalization for townships. The City Assessor, Mayor or President and City Clerk compose the Board of Equalization for cities, towns and villages, and such boards are authorized to hear all complaints of persons who feel aggrieved by their assessments and the decision of such boards are final as to individual assessments, except as the same may be affected by a general increase or decrease authorized by the County or Territorial Board of Equalization under their authority to equalize values between the several townships of a county or between the several counties of the Territory.
4. *Taxation—Uniform.* The limitations fixed by the laws of this Territory upon the different officers

and boards which comprise the machinery of the law for the taxing powers of the Territory, are: *First*, the taxation must be equal and uniform. *Second*, in assessing they must not affix values higher than the true cash values of the property assessed. *Third*, in levying they must not levy a higher rate than that limited by law.

5. *Taxation—Scope of Authority.* When property has not been valued for taxation beyond its true cash value, or a greater rate of taxation levied upon such value than that authorized by law, the owner of property has not been injured, and cannot be heard to complain provided his property has been taxed equally and uniformly with other property in the taxing district.

6. *Equalization — Territorial, County and Township Boards.* The Territorial Board of Equalization is a constituent part of the machinery for fixing the valuation of property for the purpose of taxation. The Township Board may increase or lower any individual assessment and the County Board may raise or lower the aggregate of assessments returned from the different townships of a county and the Territorial Board may lower or raise the valuation of the various counties.

7. *Territorial Board of Equalization—Powers of.* The Territorial Board of Equalization is the ultimate and final tribunal of review, with power of correction to the end that the valuations of property as fixed for the purposes of taxation shall be made to conform to the requirements of the law, to the end that all property shall be assessed at its true value.

8. *Uniform Valuation of Property—How Obtained.* The

honest and uniform valuation which the law expressly demands, is the assessment of property at its true cash value, and where the Territorial Board of Equalization finds that one county has returned its property at its true cash value and every other county has returned its property below the true cash value, the board may order that percentage to be added to the returns from those counties which are below such value, as will bring the latter up to the basis of the former, and the requirement of the law.

9. *Territorial Board of Equalization—General Powers of.* The statute creating the Territorial Board of Equalization conferred upon that board authority to review and correct the valuations of property for taxation returned to them by the county clerks of the several counties of the Territory, and to equalize such valuation upon the basis of the true cash value of the property, and may lawfully increase the aggregate valuation of the property in the several counties of the Territory as returned by the clerks of the several counties.

ERROR FROM THE DISTRICT COURT OF NOBLE COUNTY.

Action by injunction commenced on petition of *H. B. Bullen, et al., vs. J. R. Wallace, as Treasurer, the Board of County Commissioners, and the Sheriff of the County of Noble,* to restrain the defendants from collecting certain taxes. On behalf of the defendants below the case is brought to this Court by petition in error.

Mr. Attorney General and T. H. Soward for the defendants in error.

Horace Speed and H. A. Smith for plaintiffs in error.

The findings of fact and opinion of the Court were delivered by,

TARSNEY, J.

STATEMENT OF FACTS.

The petition in this case was filed in the Court below by H. B. Bullen and some seventy-five others, individuals, co-partners and corporations, taxpayers of Noble County, against J. R. Wallace, as Treasurer, and the Board of County Commissioners, and Sheriff of said county, praying an injunction to restrain the said Treasurer, County Commissioners, and Sheriff from levying or collecting against the petitioners or their property, certain taxes alleged in said petition to have been illegally assessed for the year 1895.

The facts presented by this record necessary to be considered in determining the controversy are, that the plaintiffs were the owners of real and personal property situated in said County of Noble and subject to assessment for, and to the payment of, taxes therein for territorial, county and other purposes for the year 1895.

That each of said plaintiffs duly made returns for taxation of the property respectively owned by them to the proper assessors for taxes within said county for the year 1895. That subsequently thereto, action was taken upon said returns and assessments were made of the property of each of said plaintiffs

by the officers authorized by law including said assessors, the Boards of Equalization of the several townships of said county, and the Board of Equalization of the city of Perry in said county.

That the said assessment rolls of the several townships of said county, and of the city of Perry were, by the County Board of Equalization of said county, duly examined and the valuations of property in the several townships, and said city of Perry, were equalized by said County Board of Equalization; and the assessment rolls of property in said county thus equalized were, as required by law, sent to the Territorial Board of Equalization. That the total assessed valuation of all the real and personal property in said county as equalized by said County Board of Equalization, was not less than the fair average valuation of property returned to the Territorial Board of Equalization by the several counties of the Territory. That the aggregate of valuation of assessments sent to the Territorial Board of Equalization from the several counties amounted to approximately the sum of twenty-eight millions of dollars. That the Territorial Board of Equalization upon receiving such assessment lists from the several counties, met and ordered an increase in valuation on the aggregate assessment of each county in the Territory, except the county of Kingfisher, claiming that the property in each county except Kingfisher County was not valued at its fair valuation. That the increase thus ordered in the several counties varied from about five

per cent. to over seventy-five per cent., and the total valuation of all the property in the Territory subject to taxation was by said board thus increased from about twenty-eight million dollars to about thirty-nine million dollars.

That said Territorial Board of Equalization ordered that the valuation of all property returned by the Board of Equalization of Noble County should be increased 35 per cent. That the County Clerk of Noble County, upon receiving a certificate from the Territorial Board of Equalization ordering such increase, immediately proceeded to change the lists of valuation, and increased the valuation of all the property of the plaintiffs respectively as fixed and returned by the assessors, and by the County Board of Equalization, 35 per cent, and extended such valuations thus increased upon the assessment roll of said county and upon the assessment of the property of each of said plaintiffs upon said roll. That at the time said Territorial Board of Equalization increased the valuation of the property returned for taxation in said county 35 per cent., said board also fixed the rates of levy for taxation for territorial purposes as follows:

Normal School fund levy, one-half mill on the dollar; University fund, one-half mill on the dollar; Bond Interest fund, one-half mill on the dollar; Board of Education fund, one-tenth of one mill on the dollar; General Territorial fund, three mills on the dollar. That these rates were the maximum rates

for each of said funds allowed by law; that the taxing officers of said county levied the several rates as also the several rates from the different county funds and purposes ordered by the county commissioners, and the tax roll was extended upon the books of the County Treasurer with these several rates levied upon all the property in said county, including the property of the plaintiffs respectively, upon the basis of valuation fixed by the Territorial Board of Equalization. That thereby the tax charged against and sought to be collected of each of the plaintiffs was and is 35 per cent greater than the same would have been had not said Territorial Board of Eqalization increased the valuation as stated. That each of said plaintiffs had tendered to said County Treasurer the amount of taxes charged upon the books of said Treasurer against said plaintiffs respectively, less 35 per cent of the amount thereof, which tender was refused by said Treasurer. That said taxes so levied are a lien and incumbrance upon the property of plaintiffs respectively; that said County Commissioners have ordered said Treasurer to collect such taxes for the use and benefit of said county and territory and that said Treasurer, at the time this action was instituted, was about to collect the whole of such taxes, including the 35 per cent increase as stated.

The basis of the action of the Territorial Board of Equalization, which is complained of as being without warrant of law and illegal by plaintiffs, is shown by a copy of the record of said board attached

to the answer of the defendants and made an exhibit therein, and said record, as shown by said exhibit, is as follows:

EXHIBIT "A."

Guthrie, Okla., June 17, 1895.

Agreeable to the provisions of Art. 1, of Chap. 43 of the Session Laws of 1895, the Territorial Board of Equalization met in the office of the Territorial Auditor in the city of Guthrie at 5:30 o'clock p. m., Monday, June 17, 1895, the following members being present: T. J. Lowe, Territorial Secretary, and E. D. Cameron, Territorial Auditor; Gov. W. C. Renfrow was absent on account of sickness. The Board organized by electing T. J. Lowe president and E. D. Cameron secretary. Returns of assessments not having been received from the Counties of Day, Grant, Noble and Pawnee, the Board adjourned to meet at 10 o'clock the following Thursday, June 20.

Guthrie, Okla., June 20, 1895.

The Board met pursuant to adjournment. Present: T. J. Lowe, president; E. D. Cameron, secretary. On examination and comparison of the returns of assessment from the several counties, the average rate of valuation of Kingfisher County was found to be the highest, and in the opinion of the Board, the most equitable and the most nearly in accordance with the law requiring all the property to be assessed at its actual cash value. The valuation of Kingfisher County was therefore adopted as a basis for equalization. The Secretary of the Board was directed to compute from the various returns of assessments the precentage required to be added to each for the purpose of equalization on the above basis.

Board adjourned to meet at 3 o'clock p. m.

AFTERNOON SESSION.

The Board met at the time designated. From the computations made by the Secretary of the Board it was found necessary to make the following per-centum increase, and it was by the Board so ordered: Kingfisher, 00; Beaver, 75; Blaine, 20; Canadian, 45; Cleveland, 20; "D," 50; Day, 30; "G," 30; Garfield, 35; Grant, 30; Kay, 35; Lincoln, 35; Logan, 45; Noble, 35; Oklahoma, 30; Pawnee, 25; Payne, 25; Pottawatomie, 35; Roger Mills, 5; Washita, 30; Woods, 40; Woodward, 40.

The property of the Western Union Telegraph Company, where not already assessed to the railroad companies by the Territorial Board of Railroad Assessors, was valued at $40 per mile for the first wire of line, and $10 for each additional wire. The following levies for Territorial purposes for the year 1895, were ordered, and the Territorial Auditor was directed to certify the same to the several counties for collection. For General Revenue fund, three mills on the dollar of assessed valuation; for Normal School fund one-half mill on the dollar of assessed valuation; for University Fund, one-half mill on the dollar of assessed valuation, for Bond Interest fund, one-half mill on the dollar of assessed valuation; for Board of Education fund, one-tenth mill on the dollar of assessed valuation. The Auditor was ordered to forthwith make the necessary returns of the findings of the Board to the several county clerks as by law provided. The Board adjourned *sine die*.

E. D. CAMERON,

Territorial Auditor and Secretary Board of Equalization

The Court below sustained the demurrer to the answer of the defendant, and the defendants refused further to plead, the Court entered judgment upon the facts stated in the plaintiff's petition, granting a perpetual injunction, restraining the defendant from collecting or enforcing the payment of 35 per cent. of the taxes assessed against them as stated. To the action of the Court in sustaining said demurrer to defendant's answer, and in rendering judgment for the plaintiffs, the defendants duly excepted, and have brought the case to this Court by petition and summons in error. The assignments of error are:

First—That the Court erred in holding that the 35 per cent. added to the valuation of plaintiff's property by the Territorial Board of Equalization and entered on the tax roll of Noble County against the property of the plaintiffs, was illegal and made without authority of law.

Second—That the Court erred in granting a perpetual injunction against the collection of the tax levied on said increased valuation of the property of each of defendants in error.

OPINION OF THE COURT.

The contention of defendants in error is that the action of the Territorial Board of Equalization in raising the valuation of the property in Noble County 35 per cent, and in all the other Counties in the Territory, except the County of Kingfisher, by the percentage shown, without diminishing the valuation

of the property returned from said County of Kingfisher, thereby increasing the aggregate of the value of all the property returned for taxation in all the counties of the Territory over the valuation fixed and returned by the several boards of equalization to the amount of about eleven millions of dollars, was without authority of law. That that part of the taxes levied upon the property of the defendants in error which resulted from such increased valuation, was levied without authority of law, and is therefore void, and that as to such part of the levy against their property they are entitled to relief by injunction.

Counsel, both in their briefs and in oral arguments to the Court, have presented a number of questions, touching the sufficiency of the pleadings, and the rulings of the trial court thereon; but in view of the fact that this case involves, not only the rights of the parties of record, but also involves grave questions of public concern, we have concluded to waive consideration of mere technical questions and consider only those questions which involve upon the merits, the substantial rights of the parties and of the public.

If the contention of counsel for defendants in error that the action of the Board of Territorial Equalization was without authority of law, and that that part of the taxes upon their property which resulted from the unauthorized act of such board was illegal, will injunction lie to prevent the collection of such illegal tax?

We think in such case a court of chancery has

jurisdiction, and that relief may be granted by injunction. In this Territory there is express statutory authority therefor. By Section 4143, of the Statutes of Oklahoma, Statutes of 1893, it is provided; "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or any proceeding to enforce the same, and any number of persons, whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction."

Without this express statutory authority, we think that the general powers of a court of equity, would be ample to afford relief in the case stated. Numerous well considered cases would indicate the principle as settled that a court of chancery has jurisdiction, and when invoked will assume to exercise it in all cases where a tax has been levied without authority of law, or where the property is not subject to taxation.

Cooley on Taxation, Sec.—; 77 Ill., 538, and cases cited

While we hold that this statute does not create a new remedy but was intended to enlarge the jurisdiction of courts of equity to restrain the illegal levy or collection of a tax, we are not required in this case to decide that this remedy may be invoked in every case where a tax has been irregularly or illegally assessed or levied; or, that it may be invoked in any case without the party invoking it bringing himself within the general principles of equitable relief in addition to

establishing the illegality complained of. We simply hold that if the act complained of in this case was without authority of law, the case, as presented brings the defendants in error within the general principles of equitable relief, and that the Court below had jurisdiction.

The remaining question—the vital question in controversy in this case is: Was the action of the Territorial Board of Equalization complained of without authority of law? It will not be denied, that if there was a total want of authority in the Territorial Board of Equalization to increase the valuation in the manner shown and complained of, that defendants in error are entitled to the relief prayed for. Our sole inquiry, therefore, will be; whether there is any authority for the action of said Board in adding 35 per cent. to the assessed valuation of property in Noble County by which the plaintiff's assessments and taxes levied thereon was so much enhanced.

Construing the revenue law of the Territory as establishing one system for levying and collecting taxes, it here, as often happens, that the obscurity that may appear in one section is removed by reference to other sections on the same subject. By the Revenue Law of the Territory all property is made subject to taxation, and all such property is required to be listed and assessed. An assessor of property is provided for in each township and city of the Territory. Every property owner is required to furnish the assessor an itemized account of all classes of prop-

erty owned or held by him or her, which by law is subject to assessment with the true value thereof. The assessor may require the property owner to verify such list or statement by oath or affirmation, and if such property owner neglect or refuse on demand of the assessor to give, under oath or affirmation, the statement required, the assessor shall ascertain and estimate from the best information he can obtain the number, amount, and cash value of all the several species of property required and list the same accordingly. If any person shall wilfully make, or give under oath or affirmation a false list of taxable property or place a false value thereon, he is to be deemed guilty of perjury. The assessor of each township and city, is required, from all lists and statements returned to him by property owners, and from all lists and statements made by himself, where property owners have neglected or refused to make return of such statement as required by law, to make up an assessment roll, and attach thereto his oath, which among other things shall state, that the assessor has diligently and to the best means within his power endeavored to ascertain the true amount of the value of the property returned, and that he verily believes the full value thereof is set forth in said assessment roll, and said assessor shall deliver such assessment roll and oath attached to the county clerk of his county on or before the first Monday of May, annually. The Township Assessor, Clerk and Treasurer compose a Board of Equalization for townships. The City Asses-

sor, Mayor or President, and City Clerk compose a Board of Equalization for cities, towns and villages, and such boards are authorized to hear all complaints of persons who feel aggrieved by their assessments, and the decision of said boards are final as to individual assessments, except as the same may be modified by a general increase or decrease in value ordered by County or Territorial Boards of Equalization in equalizing values between the several townships in the county, or between the several counties in the Territory. The Board of County Commissioners constitute the board of equalization for the several counties. Their duties are to equalize the assessment rolls in their county between the different townships. After such assessment rolls are thus corrected and equalized, the clerk of the county is required to make out an abstract of the same and transmit such abstract to the Auditor of the Territory.

The decision of this case depends on the construction that shall be given to these provisions of law, and to section 2624, of said law, as amended by an Act approved March 8, 1895, which said amended section reads as follows.

"The Governor, Territorial Auditor and Secretary shall constitute the Territorial Board of Equalization, and said board of equalization shall hold a session at the capital of the Territory, commencing on the 3d Monday of June each year; and it shall be the duty of said board to examine the various assessments and to equalize the same, and to decide upon the rate of territorial tax to be levied for the current

year, together with any other general or special territorial taxes required by law to be levied, and to equalize the levy of such taxes throughout the Territory. And shall therefrom find the percentage that must be added to o deducted from the assessed value of each county, and shall then order the percentage so found to be added to or subtracted from the assessed values of each of the various counties of the Territory, and shall notify the various clerks of the percentage so ordered to be added to or subtracted from the valuation of property in their respective counties. It shall then be the duty of the various county clerks to add to or deduct from the total value of the property assessed to each party, the percentage so ordered, and collect the taxes accordingly. Said board shall assess the rolling stock of railroads, and all other property not otherwise provided for."

Section 1, of Article 6, of Chapter 70, of the Statutes of the Territory of Oklahoma, as amended by an Act approved March 8, 1895, reads as follows:

"Section 1. The rate of general territorial tax shall not be less than one-half mill nor more than three mills on the dollar valuation, and in addition, one-half mill each year for the erection and support of a Territorial Normal school, and one-half mill each year for the erection and support of a Territorial University, and such levies for county purposes as are hereinafter provided, and such other taxes as may be authorized by law."

These various provisions and sections provide a comprehensive plan and scheme for the assessment and levy of taxation for the support of the territorial county and municipal governments. Each officer or

board had a separate and distinct jurisdiction within which he or it has distinct duties to perform, and for which there is a distinct and clearly defined authority of law. These several officers and boards may be said to comprise the machinery of the law for exercising the taxing powers of government. Each must act within the special scope of his or its authority, and when so acting, the only limitation that we can discover to the combined authority and jurisdiction of all is, that their imposition of taxation must be equal and uniform; in assessing they must not fix values higher than the true cash values of the property assessed; and in levying they must not levy a higher rate than that limited by the law. In other words, the general scope of the jurisdiction and powers of the taxing authorities is to impose taxation upon property assessed at its true cash value, and at a rate not exceeding the maximum fixed by law, and when the authorities have proceeded and acted within the scope of their authority as thus defined, and property has not been valued for taxation beyond its true cash value, or a greater rate of taxation levied upon such value than that authorized by law, the owner has not been injured and cannot be heard to complain, provided his property has been taxed equally and uniformly with other property in the taxing district.

While it is asserted by counsel for defendants in error that the Board of Equalization of the Territory acted without authority of law in increasing the

value of the property in Noble County 35 per cent it is not contended by them that such board had no authority in any case or for any purpose to change the valuation of such property as returned by the assessor. It must be conceded that the Board of Equalization is a constituent part of the machinery for fixing the valuation of property for the purpose of taxation. The valuation by the assessor is not final because upon complaint the township board may increase or lower any individual assessment. The action of such Township Board is not final because the County Board, while it may not directly upon an individual assessment, is yet directly authorized in equalizing aggregate valuation of the several townships to lower or raise the aggregate value as returned for any of such townships; and the Territorial Board, it must be conceded in the exercise of its admitted functions to equalize the valuations of the various counties, may lower or raise the valuation as returned from any county. In fact, it is mandatory upon them that they shall, if inequality exists. No other deduction can be drawn from this system than that it was intended that in the determining of valuations for taxation, the Township Board should exercise the powers of review and correction over the work of the assessors; that the County Boards should exercise like powers of review and correction over the work of the Township Boards; and that the Territorial Board should be the ultimate and final tribunal of review with power of correction to the end that such valuation might be made to

conform to the requirements of the law; viz, the true value of the property.

Counsel for defendants in error, while conceding that the board may increase or diminish the aggregate valuation of any county for the purpose of equalizing such valuations with the valuations of the other counties yet contend, in the words of the statute granting the power, "*to examine the various county assessments, and to equalize the same,*" limits and restricts the powers of said Board to equalizing and adjusting valuations already fixed; that the term *assessments* is synonymous with *valuations*, and here import values already determined. That such valuations already fixed are the aggregate of material with which the board could deal; that they may adjust, equalize and distribute this aggregate of valuations among the several counties, but that they cannot add to its value.

In support of this construction we are cited to the cases of

People, ex rel Crawford vs. Lothrop, 3 Col. 428.
Kittle vs. Sherwin, 11 Neb., 66.
State ex rel Lincoln vs. Edwards, 31 Neb. 370.
Kimball vs. Savings L. & T. Co., 89 Ill. 611.
Orr vs. State Board of Equalization, Supreme Court of Idaho, 28 Pac. Rep. 416.

A careful analysis of these cases will lead to the conclusion that none of them, unless it be the Colorado case, will, even apparently support the contention of defendants in error.

In *Kittle vs. Sherwin*, 11 Neb. 66, the City Council of the city of Fremont, sitting as a Board of Equalization, without any notice to the taxpayers, or to the plaintiffs, raised the assessed value of each and every assessment in the city 10 per cent above the assessed value made by the assessor, and the valuation of the plaintiff's premises and all property in said city was 10 per cent higher in its assessed value than the same was for state and county purposes assessed. The relative value of the property assessed was not changed.

The Court held the City Council sitting as a Board of Equalization had no power to thus raise the assessed value of all property assessed in the city; that such raising of valuation was not equalizing in any sense. We have already shown that the powers of a City or Township Board of Equalization is limited to action upon individual assessments, consequently they have no authority to increase the value of the aggregate of assessments in the city or townships by a uniform percentage, and the principle of that case bears no analogy to the case before us.

In *State, ex rel Lincoln Land Co. vs. Edwards*, 31 Neb. 370, the Court construed and applied a statute of the state which in express terms prohibited the Board of County Equalization from reducing or increasing the aggregate valuation fixed and returned by the assessor, except such increase or reduction as should be incidental merely.

In the case cited from the Supreme Court of Idaho,

Orr vs. State Board of Equalization, Supra, the State Board of Equalization was by statute invested with power "to raise or diminish the valuation of the several counties," but the manner in which this should be done was clearly directed by the statute as follows:

"*First*—They shall add to the aggregate valuation of real and personal property of each county which they believe to be valued below its proper valuation such percentage in each case as will raise the same to its proper valuation," and

"*Second*—They shall deduct from the aggregate valuation of real and personal property of each county which they believe to be valued above its proper value such percentage in each case as will reduce the same to its proper valuation."

The powers of the board were clearly limited by the statute. They were authorized to raise or diminish the calculation of the several counties, but only in the manner directed by the statute; viz. they might add to the aggregate valuation of property of each county which they believe to be valued below its proper valuation; or they might deduct from the aggregate value of the property of each county, which they believed to be valued above its proper valuation. The board in that case undertook to add to the valuation of the sheep in Bingham County an amount sufficient to fix a valuation thereon at the sum of two and fifty-one-hundredth dollars per head. In like manner they undertook to add to the valuaton of the cattle of said county for purposes of taxation of the same percentage of 10 per cent. on the

assessed valuation thereof as returned by the assessor of said county. They also undertook to order and adjudge that the Utah & Northern Railway from Pocatello northward to the state line between Idaho and Montana should, for the purpose of taxation be a branch road and that the valuation thereof should be reduced from eight thousand dollars per mile to five thousand dollars per mile, and also undertook to deduct from the valuation of a part of the Oregon Short Line Railway lying in said County of Bingham, and from a portion of the Utah & Northern Railway, lying south and east of Pocatello as fixed by the assessor of said county and not changed by any County board of equalization, the sum of one thousand dollars per mile for each and every mile thereof. The Court in that case held correctly, as we think it must be conceded, that under the special restricted authority to equalize valuations between the several counties by adding to or subtracting from the aggregate valuation as returned by the Assessor and County Board of Equalization by a certain percentage, no authority could be deduced therefrom authorizing such board to increase or diminish the valuations fixed upon specific classes of property, and hence, we find nothing in that case bearing in any manner upon the principle contended for in the case before us.

The case of *Kimball vs. Merchants Savings L. & T. Co.*, 89 Ill., 611, arose under a statute which provided as follows:

"It (the County Board), shall ascertain whether

the valuation in one town or district bears a just relation to all the towns and districts in the county, and may increase or diminish the aggregate valuation of property in any town or district by adding to or deducting such sum upon the hundred dollars *as may be necessary to produce a just relation between all the valuations of property in the county.*"

It further provided that such board should not in any instance reduce or increase the valuation of all the towns and districts as made by the assessor, except in such manner as might be actually necessary and incidental to a proper and just equalization. The complainant in that case in the spring of 1887 returned to the Assessor of the town of South Chicago a statement of its personal property liable to taxation, and placed upon it a valuation of $500,000. It was so returned to the County Clerk without modifiction. The County Board of Equalization added 20 per cent. to the assessed valuation of personal property in the town of South Chicago, but made no changes in other towns. The per cent added to personal property in South Chicago increased the aggregate value of assessed property in that town over $2,000,000 and consequently increased, by a large per cent. the aggregate assesssed value of the entire property of the county. The 20 per cent. added by the County Board to the complainant's property increased that valuation to $600,000. The state board of equalization directed that 57 per cent be added to the assessed value of personal property in Cook County, and thus the valuation of complainant's property was raised by

the County Board from $500,000 to $600,000, and by the State Board to $942,000, and upon this latter sum was computed and extend the several kinds of taxes for said year. No question was raised or discussed in the case relating to the action of the State Board in raising the assessment 57 per cent. That appeared to be conceded as authorized and legal. The question was in regard to the action of the County Board in making the 20 per cent increase, and that was held to be illegal because of the limitations of the statutes upon the powers of a County Board.

The Court, in its opinion and distinguishing the case they were considering from a case previously decided by the same court, said:

"The case of *Scammon vs. The City of Chicago*, 44 Ill. 269, cited is not an authority in the case we are considering. That case arose under a different law—one that conferred power upon the board acting for the purpose of equalizing assessments to add to, take from or otherwise correct and revise the same, without imposing any limitation upon their discretion in the matter."

Construing the powers of the County Board under the statute they were then considering, that court said:

"The powers such boards may rightfully exercise are defined and limits fixed beyond which they may not go. All acts beyond the restrictions are void as being without authority of law."

Each of these cases are dissimilar in almost every feature from the case before us. Each dealt with the

powers and functions of minor boards of equalization, (except the Idaho case) those of counties or cities not possessing final powers of review and correction whose authority to increase or diminish the aggregate of valuations of property for taxation within their respective districts was by statute expressly inhibited, or expressly granted and limited.

The case cited from the Colorado court more apparently bears out the contention of defendant in error. In that case [3 Col. 428] it was shown that the state board of equalization, for the year 1877, increased the aggregate valuation of the real and personal property of each of twenty counties of the state above the valuation as returned by the several clerks of such counties. That the aggregate of the increase in said twenty counties amounted to upwards of $5,000,000. That at the same time they diminished the aggregate valuation of four other counties to the amount of about $49,000; that they made no changes of the valuation of the property of the other counties of the state; that the net increase of the aggregate valuation of all the counties of the state above the aggregate valuations returned by the clerks of the several counties was about $5,000,000.

The Constitution of the State of Colorado defined the duties of the State Board of Equalization to be "to adjust and equalize the valuation of real and personal property among the several counties of the state." It also provided for the election in each county in each alternate year of a County Assessor,

thus making the assessor of taxes a constitutional officer, and the statute of the state provided for the election of a County Assessor and defined his qualifications and duties. It also provided that the County Commissioners of each county should constitute a Board of Equalization for the "correction and completion" of the assessment rolls with power to supply omissions in said rolls, and for the purpose of equalizing the same to increase, diminish or otherwise alter or correct any assessment or valuation. It constituted such board a quasi court to hear any and all complaints with sole power to adjust and correct the assessment rolls as in their judgment they might deem proper and right. It constituted such board a board of appeals and review for the purpose of ascertaining, determining and fixing the value of taxable property in each county in the state as a basis of taxation. After reviewing the constitutional and various statutory provisions of the state relating to the assessment and valuation of property for taxation that court said:

"Looking then to the provision of the constitution and the statute, we are clearly of the opinion that the power to fix and determine the valuation of taxable property is lodged by them in the assessor and that when they have, under the law, performed this duty and exercised this power that the sum of the valuation of the several counties so by them found must be taken as the aggregate valuation of all the property in the State, and is conclusive and final as against the State Board of Equalilation. The state board may, for the purpose of adjusting and equaliz-

ing, increase the aggregate valuation of one county, and decrease the aggregate valuation of another, but they have no power to increase the sum of all the valuations of the valuations of the several counties of the State. That aggregate valuation has been found for them, and fixed by the authorities, and in the mode prescribed by law. This view is not only sanctioned by the force of the general provisions of the statutes considered as a whole, but, also, by the phraseology of the sections under consideration. The board is to adjust and equalize the valuation. This term, valuation, here imports values already estimated and fixed, and must be referred for the measure of its force and meaning to the mode prescribed by law for estimating and fixing valuations. The aggregate material with which the board can deal is thus limited. They may adjust and equalize it among the several counties, but they can not add to its volume."

It is not necessary that we should dissent from the reasoning or conclusion of the learned Court in that case in order to arrive at a different result in the case we are considering. The Court found sanction for its views in that case in the peculiar provisions and phraseology of the statute which they were construing. The section of the Colorado Statute creating Boards of County Equalization and defining their duties, is peculiarly different from ours; there the board was created "*for the correction and completion of the assessment rolls,*" with power to supply omissions in the same, and for the purpose of equalizing the same, "to increase, diminish or otherwise alter and correct any assessment or valuation."

The statute contemplated but one assessment for state and local taxes. The action of the County Board was final as to local taxation, made final by express statutory terms. The state board was created to adjust and equalize.

For that purpose the board was required by statute (Gen'l Laws Col. sec. 42, p. 756,) to "examine the various assessments *as far as regards the State tax*, and equalize the rate of assessment of the various counties whenever they are satisfied *that the scale of valuation has not been adjusted with reasonable uniformity* by the different assessors." By section 43, of the same, the board is required to ascertain whether the "valuation of real estate in each county bears a fair relation or proportion to the valuation of all other Counties in the State, and on such examination they may increase or diminish the aggregate valuations of real estate in any county as much as in their judgment *may be necessary to produce a just relation between all the valuations of real estate in the state*, but in no instance shall they reduce the aggregate valuation of all the counties below the aggregate valuation as returned by the clerks of the several counties."

It is obvious that a much greater authority and finality of action was conferred upon the County Boards of Equalization by the Colorado Statutes than is conferred upon the same boards by the statutes of this Territory, and it is equally obvious that the powers and duties of the State Board of Colorado, as limited and restricted by statute, are entirely dissim-

ilar from those of the Territorial Board of this Territory. True, the general definition of their duties are substantially the same. In our statute "to examine the various county assessments and to equalize the same." In the Colorado Constitution, "to adjust and to equalize the valuation of real and personal property among the several counties of the State." Our Territoria Board is authorized to find the percentage that must be added to or deducted from the assessed value of each County and to order the percentage so found to be added to or substracted from the assessed values of each of the various counties of the Territory" to be added to or deducted from the assessed value of each county. The natural construction of this language would authorize the percentage which the board should find proper to be added to the assessed value of each or every county in the Territory, or to be subtracted from each or every county in the absence of any inhibition against increasing or diminishing the aggregate of assessed value. We think this was the intention of the Legislature. Had they intended to vest the board with power to equalize only in the sense of distributing equally among the several counties their portion of the aggregated valuation returned, this would necessitate both increase and decrease and the Legislature would have used language more apt to express such limitation or purpose. Under the Colorado Statutes the board dealt only with the "*scale of valuation.*" They were only authorized to act when they were satisfied that

the "*scale of valuation had not been adjusted with reasonable uniformity*" by the assessors. In this Territory, the board, we think, is authorized to act, not on the scale of valuation as returned and for the purpose of securing uniformity in such scale, but upon the valuation for the purpose of securing an honest and uniform valuation of property for taxation. That honest and uniform valuation which the law expressly demands, that is, its assessment and valuation at its true cash value. The Board of Equalization found on examination, that property in Kingfisher County had been honestly assessed and returned at its true cash value. They further found that in every other county of the Territory property had been assessed and returned with valuations fixed at from five to seventy-five per cent. below the true cash value, and they ordered that percentage to be added to the return valuation of each of the counties except Kingfisher, that would make the assessment the true value, and thus equalize the valuation of all the counties upon the basis of the requirement of the law. In this, we think, they were acting within the scope of their authority. They might have reduced the valuation of property in Kingfisher County by a few hundred thousand dollars, or by a million, and distributed that amount among other counties, and thus equalized and made uniform the valuation of the several counties; but, we think, that is not the equalization that is contemplated by law; that that which is contemplated is that all property shall be assessed at its true

value, and that when it is so assessed, and then only, can there have been a proper equalization.

We are supported in the conclusion we have arrived at in this case by the authority of *Black vs. McGonigle*, 103 Missouri, 78. In that case the County Board of Equalization of Knox County for the year 1888, made the following order:

"Ordered by the Board of Equalization that they have and do hereby equalize the valuation and assessments on all real estate in the County of Knox, and in the various townships therein, taking the assessed valuation of real estate in Center Township as a basis, and do hereby eaqualize and raise the valuation of all real estate in the following townships:"

Then follows a list of the other nineteen townships of the county with the increase ordered, varying from thirty-five to fifty per cent. It was asserted that this was beyond the authority of the board, as in this case it was insisted that one township or taxing district could not be taken as a basis, and the assessment of all the other townships or districts raised to that basis, thus increasing largely the aggregate of the valuation of the county, an injunction was brought to restrain the collection of the excess of taxation resulting therefrom. In that case Mr. Chief Justice Black says:

"The first contention of the appellant is that the action of the board in raising the assessed values of real estate in all the townships, except one, by a single order on a percentum basis, is illegal and void. The propositions contained in this objec-

tion must, of course, be determined by the statute. Section 6672, Rev. St. 1879, gives to the board power "to hear complaints, and to equalize the valuation and assessments upon all real and personal property within the county;" and it is then made the duty of the board "to equalize the valuations and assessments of all such property, both real and personal, so that each tract of land shall be entered on the tax book at its true value." * * * * The law, however, clearly contemplates that all property shall be assessed at its true value, and if, in the opinion of the board, this has not been done, then the assessment may be increased so as to comply with the spirit and intention of the law. Where the lands in one township have been assessed at their true value, and those in another township have been assessed at a uniform lower rate, then the assessed value of the lands in the latter may be brought up to the standard of the former, and that is what appears to have been done in the present case. In such a case it is not necessary to specify each parcel of land thus increased. It is sufficient to increase the assessed value of all the lands in the particular township by one order; and this increase may bemade on a percentum basis." With the support of the authorities.

In view of the Act of Congress which prohibits any political or municipal corporation, county or other sub-division in any of the territories of the United States from becoming indebted in any manner, or for any purpose, to an amount in the aggregate, including existing indebtedness exceeding four percentum on the value of the taxable property within such corporation, county or sub-division, to be ascer-

tained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness and declaring all bonds and obligations in excess of such amount given by such corporation, county, etc., void, and in view of the fact that subsequent to the making of the assessment complained of in this case, and prior to the commencement of this action, many of the counties and municipal corporations therein of this Territory had in good faith, and for proper public purposes, relying upon the validity of such assessment, increased their bonded and other obligations and indebtedness to an amount in excess of four percentum of the value of the taxable property within such county or municipal corporations as the valuation of such property was assessed and returned by the County Boards of Equalization of such counties for taxation for the year 1895; and that parties not parties to this record have in good faith, and for valuable considerations before the commencement of this action, became the purchasers and holders of such indebtedness; this Court, having regard for public honor, faith and credit, can not consent that the ordinary and common rules for construing a public statute should be violated or strained and clearly expressed legislative intent be disregarded when such departure from established rules of interpretation would clearly result in the violation of private rights, and the impairment of public faith, and might seriously impair the usefulness of territorial, county and municipal governments by depriving them of the just

revenue necessary for a proper discharge of their functions.

We hold that the statute creating the Territorial Board of Equalization conferred upon that board authority to review and correct the valuations of property for taxation returned to them by the County Clerks of the several counties of the Territory, and to equalize such valuation upon the basis of the true cash value of the property, and that they may lawfully increase the aggregate of valuation of property in the several counties of the Territory returned by the said several clerks of the several counties; that the several acts of said board complained of in the petition in this cause was within the jurisdiction of said board, and authorized by law.

That the taxes, the collection of which is sought to be enjoined, was assessed and levied according to law.

The judgment of the Court below will be reversed and the cause dismissed.

All the Judges concurring, except Bierer, J., not sitting, having presided as Judge below; Justice McAtee dissents.